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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

PETER MACDONALD, Chairman of the Navajo Tribal Council of the Navajo Indian Tribe, for and on Behalf of the Navajo Indian Tribe and All Villages, Clans, and Individual Members of the Navajo Tribe,

Petitioner,

v.

ABBOTT SEKAQUAPTEWA, Chairman of the Hopi Tribal Council of the Hopi Indian Tribe, for and on Behalf of the Hopi Indian Tribe and All Villages, Clans, and Individual Members of the Hopi Tribe,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals' holding that a statute purporting to establish an Indian reservation should make "mention of title" and that a "strict standard" of construction must be applied to such a statute conflicts with the decisions of this Court and places in jeopardy what has heretofore been the recognized title of many Indian tribes to their reservations.

2. Whether the Court of Appeals' decision that the Navajo Tribe has no interest in any portion of the Navajo Reservation upon which the Hopi Tribe may have been located in 1934 is inconsistent with the decision of this Court in *Healing v. Jones,* and is a particularly serious miscarriage of justice in light of the fact that the opposite result was reached in the *Healing* case, where the roles of the two Tribes were reversed.

THE PARTIES

The parties in the proceedings below are too numerous to be listed. They include the Navajo Tribe of Indians and all its villages, clans and individual members (estimated to include approximately one hundred sixty thousand individuals) and the Hopi Tribe of Indians and all its villages, clans and individual members (estimated to include approximately nine thousand individuals).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW AND JURISDICTION

The decision of the United States District Court for the District of Arizona (Copple, J.), entered on April 5, 1978, wherein the Court ruled upon cross-motions for summary judgment, is reported at 448 F. Supp. 1183 (D. Ariz. 1978) and is attached as Appendix A. The opinion of the Court of Appeals (Skopil, J.), entered on May 23, 1980, affirming in part and reversing in part the decision of the District Court, is presently unreported and is attached hereto as Appendix B. This

Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The District Court and the Court of Appeals have interpreted the meaning and effect of the Act of June 14, 1934, 48 Stat. 960,[1] a copy of which is attached hereto as Appendix C. The District Court's jurisdiction over the controversy was conferred, and the issues were defined, by Section 8 of the Act of December 22, 1974, 25 U.S.C. § 640d-7, a copy of which is attached as Appendix D.

STATEMENT OF THE CASE

A. Proceedings Below.

Pursuant to the jurisdictional authority contained in Section 8 of the Act of December 22, 1974 (App. D), on December 30, 1974 the Hopi Tribe filed a complaint in the District Court alleging that the Navajo Boundary Act (App. C) had granted the Hopi Tribe an undivided one-half interest in all lands within the boundary described in the 1934 Act, excepting certain tracts specifically excluded from the complaint. The Navajo Tribe filed an answer to the complaint on February 10, 1975, asserting that the Navajo Tribe's interest in the 1934 area was exclusive.

Pursuant to stipulation, the District Court entered a pretrial order limiting the initial proceedings to the single issue of determining the meaning and effect of the

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[1]The Act of June 14, 1934, 48 Stat. 960, entitled "An Act to define the exterior boundaries of the Navajo Indian Reservation in Arizona, and for other purposes," is hereinafter sometimes referred to as "the Navajo Boundary Act" or "the 1934 Act."

Navajo Boundary Act. Specifically, the key language which was to be construed appears in Section 1 of the legislation, as follows:

> Be it enacted . . . That the exterior boundaries of the Navajo Indian Reservation, in Arizona, be, and they are hereby, defined as follows: [legal description omitted]. . . . All vacant, unreserved, and unappropriated public lands, including all temporary withdrawals of public lands in Arizona heretofore made for Indian purposes by Executive order or otherwise within the boundaries defined by this Act, are hereby permanently withdrawn from all forms of entry or disposal for the benefit of the Navajo and such other Indians as may already be located thereon; however, nothing herein contained shall affect the existing status of the Moqui (Hopi) Indian Reservation created by Executive order of December 16, 1882. (App. C.)

Pursuant to the foregoing order, in April, 1977, the Hopi Tribe and the Navajo Tribe filed motions for summary judgment as to the meaning and effect of the 1934 Act.

In a Memorandum and Order dated April 5, 1978, the District Court held that the Navajo Tribe, as the tribe whose reservation was expressly enlarged and defined by the 1934 Act, has an interest in the entire area described in that legislation. Furthermore, in rejecting the Hopi Tribe's claim to a one-half interest in all of the 1934 area, the District Court determined that the Hopi Tribe has a one-half interest in only those portions of the Navajo Reservation upon which the Hopi Tribe was "located" in 1934. Finally, the District Court held that, within the meaning of the 1934 Act, all subject lands were "unreserved and unappropriated" as of 1934, including the area withdrawn by the Executive Order of January 8, 1900 (App. E) and referred to as part of the

Navajo Indian Reservation in the Act of May 27, 1902 (App. G) and in subsequent statutes.

The Hopi Tribe and the Navajo Tribe filed interlocutory appeals under 28 U.S.C. § 1292(b). On May 23, 1980, the Court of Appeals handed down an opinion which affirmed in part and reversed in part the decision of the District Court. The Court of Appeals, in reversing a portion of the lower court's judgment, determined that the Hopi Tribe's interest in those areas it occupied in 1934 was exclusive, or, conversely, that the Navajo Tribe had no interest in such lands. The Court of Appeals affirmed the District Court's finding that all subject lands, including the area set aside by the Executive Order of January 8, 1900, were "unreserved and unappropriated" within the meaning of the 1934 Act.

B. Statement of Facts.

The Navajo Reservation was established by treaty in 1868 and was enlarged by a series of Presidential Executive Orders and Acts of Congress[2] as additional lands became needed to support a growing Navajo population.

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[2]The Navajo Reservation was enlarged or ratified by Executive Orders in 1878, 1880, 1884, 1900, 1901, 1907, 1908, 1913, 1917 and 1918 and by Acts of Congress in 1902, 1930, 1931 and 1934.

In the midst of the Navajo Reservation is a reservation established by Presidential Executive Order in 1882 "for the use and occupancy of the Moqui [Hopi], and such other Indians as the Secretary of the Interior may see fit to settle thereon." The 1882 reservation was occupied and claimed by both Hopi and Navajo Indians, and the Tribes' respective rights and interests in the 1882 reservation have been litigated in other cases. *Healing v. Jones*, 210 F. Supp. 125 (D. Ariz. 1962), *aff'd*, 373 U.S. 758 (1963); *Hamilton v. Nakai*, 453 F.2d 52 (9th Cir. 1971), *cert. denied*, 406 U.S. 945 (1972); *Hamilton v. MacDonald*, 503 F.2d 1138 (9th Cir. 1974); *Sekaquaptewa v. MacDonald*, 544 F.2d 396 (9th

[footnote continued]

One such enlargement was accomplished by the Executive Order of January 8, 1900 and the Act of May 27, 1902. The events leading to that enlargement began in the late 1890's when the Acting Secretary of the Interior directed James McLaughlin, a United States Indian Inspector, to examine the area located to the west and south of what was then the Navajo Reservation (App. F, at 54a). By letter to the Secretary, dated June 13, 1899, Inspector McLaughlin submitted a "report with reference to increasing the Navajo Indian Reservation," which recommended an "extension of the Navajo reservation" to include the lands later withdrawn under the Executive Order of January 8, 1900 (App. F, at 56a).

The Secretary of the Interior subsequently recommended to the President, by correspondence dated January 5, 1900, that the lands previously examined by Inspector McLaughlin be added to the Navajo Reservation (App. F, at 51a). Specifically, the Secretary requested that Congress appropriate $48,000 to purchase the improvements which had been constructed in the area by non-Indian settlers, and further suggested that the President should issue an Executive Order withdrawing the lands from further entry pending Congressional action.

The President accepted the Secretary's recommendations, issuing the requested Executive Order and transmitting the relevant correspondence and documents to

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Cir. 1976), *cert. denied*, 430 U.S. 931 (1977); *Sekaquaptewa v. MacDonald*, 575 F.2d 239 (9th Cir. 1978). Accordingly, the 1882 area has been expressly excluded from this litigation.

The patchwork growth of the Navajo Reservation is illustrated on a map appearing in the District Court's opinion, 448 F. Supp. at 1185 (App. A, at 2a). The Hopi Tribe's claim in this litigation covers the entire area shown by the map, excluding the parcels designated 1868, 1882, 1930 and 1931.

the Congress, where they were printed as Senate Document No. 68, entitled "Enlargement of Navajo Indian Reservation, in Arizona" (App. F). The foregoing document was explicitly incorporated by reference in the Act of May 27, 1902, which in relevant part appropriated $48,000 "[f]or the purchase of the right, title and improvements of certain settlers within the external boundries [*sic*] of the Navajo Indian Reservation in Arizona, as set out in the communication of the Secretary of the Interior to the President, dated January fifth, nineteen hundred, and printed in Senate Document Numbered Sixty-eight, of date of January tenth, nineteen hundred." App. G.

SUMMARY OF ARGUMENT

Legal authorities, including the decisions of this Court, long have held that Congressional legislation establishing an Indian reservation need not do so in an explicit or highly formalized fashion. A Congressional enactment which reflects an intent to appropriate specified lands for Indian purposes has always been considered sufficient. Thus, the Court of Appeals departed significantly from the established precedents of this Court when it held that a "strict standard" must be applied in construing a statute purporting to create an Indian reservation, and that such legislation should make "mention of title" in order to grant Indians permanent occupancy rights. Furthermore, the decision of the Court of Appeals places in jeopardy the interests of numerous other Indian tribes in their statutory reservations.

In *Healing v. Jones,* 210 F. Supp. 125 (D. Ariz. 1962), *aff'd,* 373 U.S. 758 (1963), the Court determined the respective interests of the Hopi and Navajo Tribes in

an area set aside pursuant to the Executive Order of December 16, 1882, which withdrew lands "for the use and occupancy of the Moqui [Hopi], and such other Indians as the Secretary of the Interior may see fit to settle thereon." The *Healing* decision ruled that because the Hopi Tribe was explicitly mentioned in the withdrawal order, the Hopi Tribe possessed a one-half interest even in those lands occupied exclusively by Navajos. With respect to the Navajo Boundary Act, the situation is reversed, with the Navajo Tribe being expressly named in the Act and the Hopi Tribe claiming to be the "other Indians." The Court of Appeals held, however, in direct conflict with the rule affirmed by this Court in the *Healing* case, that the Navajo Tribe, although explicitly named in the 1934 Act, has no interest whatsoever in lands occupied by the Hopi Tribe in the 1934 area.

REASONS FOR GRANTING WRIT

A. The Court of Appeals' decision, which holds that a "strict standard" must be applied to statutes purporting to establish Indian reservations, and that such legislation should make "mention of title", *conflicts directly* with the decisions of this Court concerning the criteria for determining whether Congress has established title of an Indian tribe to reservation lands.

Since the earliest years of the Republic, the respective land rights of Indian tribes and the Federal Government have been at the core of the relationship between Indians

and the United States.[3] As the basic maxims of Federal Indian law developed, "recognized title"[4] of an Indian tribe to the land which it occupied became a critically important legal term. "Recognized title" (in contrast to lesser rights of occupancy which might be extinguished at will) is an Indian interest in land which Congress has agreed to respect and which is protected by the Fifth Amendment and cannot lawfully be taken from the Indian owners except upon payment of just compensation.[5] Recognized title is generally considered the most secure and desirable form of Indian tribal ownership.

Recognized Indian title can arise in a number of ways. A noted authority on Federal Indian law, former Acting

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[3]*See* F. Cohen, *Handbook of Federal Indian Law* xxi-xxiii (1942); Comment, *Indian Land Claims Under the Nonintercourse Act*, 44 Alb. L. Rev. 110 (1979); Berman, *The Concept of Aboriginal Rights in the Early Legal History of the United States*, 27 Buffalo L. Rev. 637 (1978).

[4]*See Miami Tribe v. United States*, 175 F. Supp. 926, 936, 940 (Ct. Cl. 1959):

> Where Congress has by treaty or statute conferred upon the Indians or acknowledged in the Indians the right to *permanently* occupy and use land, then the Indians have a right or title to that land which has been variously referred to in court decisions as "treaty title", "reservation title", "recognized title", and "acknowledged title". . . . [T]here exists no one particular form for such Congressional recognition or acknowledgement of a tribe's right to occupy permanently land and that right may be established in a variety of ways.
>
> * * *
>
> By "recognition", the courts have meant that Congress intended to acknowledge, or if one prefers, to grant, to Indian tribes rights in land which were in addition to the Indians' traditional use and occupancy rights exercised only with the permission of the sovereign.

[5]*See, e.g., United States v. Klamath and Moadoc Tribes*, 304 U.S. 119 (1938).

Solicitor of the Department of the Interior Felix S. Cohen, has written that no particular formulation is required to establish Indian tribal rights in land. F. Cohen, *Handbook of Federal Indian Law* 291 (1942), citing *Minnesota v. Hitchcock*, 185 U.S. 373, 389-90 (1902):

> Now, in order to create a reservation it is not necessary that there should be a formal cession or a formal act setting apart a particular tract. It is enough that from what has been done there results a certain defined tract appropriated to certain purposes.

The principle of *Minnesota v. Hitchcock* has become firmly embedded in Federal Indian law and as questions of Indian rights to land continue to arise, the courts often fall back on the words enunciated in the 1902 *Hitchcock* opinion.[6]

Another equally fundamental principle of Indian law mandates that the language of treaties or statutes affecting Indians must be construed by resolving any doubt in favor of the Indians. In the oft-cited words of Chief Justice Marshall in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 582 (1932):

> The language used in treaties with the Indians should never be construed to their prejudice. . . . How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.

Accord, Jones v. Meehan, 175 U.S. 1, 11 (1899). Though

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[6]The continuing vitality of *Minnesota v. Hitchcock* is illustrated by *Sac & Fox Tribe v. Licklider*, 576 F.2d 145 (8th Cir. 1978), wherein the Court held, on the authority of *Minnesota v. Hitchcock*, that an Indian reservation had been created by various Federal actions, none of which involved a formal grant of title.

the foregoing canon of construction was initially formulated in the context of Indian treaties, this Court long ago applied it also to statutes affecting Indian interests:

> [T]he general rule [is] that tax exemptions are to be strictly construed . . . .
>
> But in the Government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years and has been applied in tax cases.

Choate v. Trapp, 224 U.S. 665, 674-75 (1912). *Accord, Bryan v. Itasca County,* 426 U.S. 373, 392 (1976); *Carpenter v. Shaw,* 280 U.S. 363, 366-67 (1930); *Alaska Pacific Fisheries v. United States,* 248 U.S. 78, 89 (1918).

Both of the foregoing well-established legal principles are flatly contradicted by the decision of the Court of Appeals in this case. The Navajo Tribe contends that a specific area of land, which is now part of the Navajo Indian Reservation, was "recognized" by Congress as Navajo Indian land under the Act of May 27, 1902, 32 Stat. 245 (hereinafter referred to as the "1902 Act"). The Court of Appeals rejected that contention, denigrating the 1902 Act because:

> A strict standard applies in determining whether legislation transfers or recognizes compensable title. . . .

> The [1902 Act] makes no direct or indirect mention of title. [App. B, at 34a.][7]

As support for the foregoing ruling, the Court of Appeals cited *Tee-Hit-Ton Indians v. United States,* 348 U.S. 272 (1955), and *Hynes v. Grimes Packing Co.,* 337 U.S. 86 (1949).

The appellate court misapplied the holdings in those cases. Indeed, the *Tee-Hit-Ton* case, 348 U.S. at 278, stressed the very proposition which the Navajo Tribe has advanced in this litigation and which the Court of Appeals has overlooked:

> There is no particular form for congressional recognition of Indian right of permanent occupancy.

Neither the *Tee-Hit-Ton* case nor *Hynes v. Grimes* supports the "strict standard" of construction applied by the Court of Appeals or requires that there should be "mention of title" in order to establish an Indian reservation. Indeed, those cases confirm that recognized Indian title will be upheld if such title is established or ratified by statute and in that respect they support the Navajo position.

The holding that a "strict standard" applies in construing legislation that is claimed to recognize Indian title and the implication that such acts must make "direct or indirect mention of title" carries far-reaching

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[7]The Court of Appeals further stated that "[t]he Navajos do not point to convincing legislative history to support their position" (App. B, at 34a). However, it appears from that opinion that the appellate court overlooked or ignored the most significant elements of the legislative history, Doc. No. 68 (App. F), particularly the letter of the Secretary of the Interior of January 5, 1900 (App. F, at 51a), recommending the establishment of the reservation, both of which were, by reference, incorporated into the statute. *See* App. B, at 34a, n.4.

consequences since it casts a cloud over the title of a great many Indian tribes.[8]

Applying the foregoing fundamental legal principles to the relevant facts of this case (*see* Statement of Facts, *supra*, and App. E, F nd G), the Navajo Tribe contends that the Navajo Boundary Act may have given the Hopi Tribe a potential interest in lands *newly added* (*i.e.*, previously "unreserved and unappropriated") to the enlarged Navajo Reservation in 1934, but in no event could the Hopi Tribe have an interest in lands to which the Navajo Tribe obtained recognized title *prior to 1934*. The Navajo Tribe further contends that the land described in the Executive Order of January 8, 1900 was incorporated into the Navajo Reservation through

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[8]The following are among the numerous statutes which have established Indian reservations without "direct or indirect mention of title" and the Indians whose title would be in jeopardy under the ruling of the Court of Appeals:

Act of May 28, 1937, 50 Stat. 241 (Koosharem Band of Paiute Indians in Utah); Act of April 22, 1937, 50 Stat. 72 (Capitan Grande Band of Mission Indians); Act of June 22, 1936, 49 Stat. 1806 (Walker River Indian Reservation; Act of January 17, 1936, 49 Stat. 1094 (Indians of Fort McDermitt, Nevada); Act of June 20, 1935, 49 Stat. 393 (Kanosh Band of Indians of Utah); Act of May 14, 1935, 49 Stat. 217 (Rocky Boy Indian Reservation); Act of February 12, 1932, 47 Stat. 50 (Skull Valley Indian Reservation); Act of February 11, 1929, 45 Stat. 1161 (Kanosh Band of Indians in Utah); Act of February 11, 1929, 45 Stat. 1161 (San Ildefonso Pueblo); Act of May 23, 1928, 45 Stat. 717 (Indians of Acoma Pueblo); Act of March 3, 1928, 45 Stat. 162 (Indians of Indian Ranch, Inyo County, California); Act of March 3, 1928, 45 Stat. 162 (Koosharem Band of Indians in Utah); Act of June 1, 1926, 44 Stat. 679 (Morongo Indian Reservation); Act of May 21, 1926, 44 Stat. 614 (Makah and Quileute Indians); Act of May 10, 1926, 44 Stat. 496 (Mesa Grande Reservation); and Act of April 12, 1924, 43 Stat. 92 (Zia Pueblo).

the 1902 Act, and was thereafter repeatedly recognized by Congress as the "Western Navajo Reservation" in subsequent legislation.[9] Finally, the Navajo Tribe contends that the recognized Indian title of the Navajo Tribe which vested in 1902 was not and could not be divested by the "other Indians" language in the 1934 Act.

Congress first recognized and confirmed the title of the Navajo Tribe by the language[10] of the 1902 Act, whereby Congress appropriated $48,000 for

> the purchase of the right, title and improvements of certain settlers within the external boundries [*sic*] of *the Navajo Indian Reservation* in Arizona, as set out in the communication of the Secretary of the Interior to the President, dated January fifth, nineteen hundred, and printed in Senate Document Numbered Sixty-eight, of date of January twenty, nineteen hundred. [Emphasis added.] (App. G.)

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[9] *See* Act of June 30, 1913, 38 Stat. 77; Act of August 1, 1914, 38 Stat. 582; Act of May 23, 1930, 46 Stat. 378; and Act of February 21, 1931, 46 Stat. 1204.

[10] In contrast to the 1902 Act, the statutes at issue in the *Hynes* and *Tee-Hit-Ton* cases contained little or no indication that Congress intended to make permanent reservations of rights or lands in favor of Indians. In the *Hynes* opinion, this Court observed that the Congressional enactment at issue stated only that "for the purpose of protecting and conserving the fisheries of the United States in all waters of Alaska the Secretary of Commerce from time to time may set apart and reserve fishing areas in any of the waters of Alaska over which the United States has jurisdiction. . . ." *Hynes v. Grimes Packing Co.*, 337 U.S. at 92-93. In the *Tee-Hit-Ton* case the statute provided on its face that "the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress." *Tee-Hit-Ton Indians v. United States*, 348 U.S. at 278 n.10. Clearly, those statutes do not begin to approximate the clarity of Congressional intention which appears in the 1902 Act.

It is significant that the statute incorporates its own legislative history by reference. Senate Document No. 68 sets forth the correspondence within the Interior Department which caused the Secretary of the Interior to recommend to the President the enlargement of the Navajo Reservation and to request the appropriation of $48,000 to purchase the rights of non-Indian settlers within the area to be added to the reservation (App. F, at 51-53a). Pending Congressional action, the Secretary recommended issuance of an Executive Order withdrawing the lands in issue from entry, which recommendation was accepted by the President. (*Id.*) The President issued the Executive Order and transmitted the documents to the Congress, where they were printed as a Senate Document entitled "Enlargement of Navajo Indian Reservation, in Arizona". That document was incorporated by reference in the statute, which clearly constituted Congressional recognition of the Navajo right to permanent occupancy of the area. Thus, because the Congress in 1902 established recognized title in the Navajo Tribe to the land here in issue, the Navajos submit that Congress did not and could not give the Hopi an interest in portions of tht land in 1934.

In light of the foregoing, Petitioner submits that the Court of Appeals has tampered with legal principles which lie at the core of the relationship between the Federal Government and Indian tribes. Its decision is in conflict with the decisions of this Court in *Minnesota v. Hitchcock* and the long line of cases stretching from *Worcester v. Georgia* to *Bryan v. Itasca County*. Moreover, the lower court has misconstrued the decisions of this Court in *Tee-Hit-Ton Indians v. United States,* and *Hynes v. Grimes Packing Co.* Because of the broad implications of the decision below for Indian rights in

reservation lands, this case is particularly appropriate for review and correction by this Court.

B. The Court of Appeals' holding that the Navajo Tribe, although named explicitly in the 1934 Act, has no interest in lands within the 1934 area occupied by the Hopi Tribe is inconsistent with this Court's decision in *Healing v. Jones*.

The Hopi Tribe's claim of an interest is based *entirely* on the "other Indians" phrase in the Navajo Boundary Act. The District Court ruled that the Navajo Tribe (being the Tribe named in the Navajo Boundary Act) has an interest in the entire Navajo Reservation and that the Hopi Tribe, if it can prove that it was "located" on the Reservation in 1934, is entitled to a one-half interest in the lands on which it was "located". In so ruling, the District Court properly reached the only decision which would have been consistent with *Healing v. Jones*, 210 F. Supp. 125 (D. Ariz. 1962), *aff'd*, 373 U.S. 758 (1963). Without even discussing the rule of *Healing v. Jones*, the Court of Appeals reversed and held that the Navajo Tribe has no interest in any portion of the Navajo Reservation upon which the Hopi Tribe was located in 1934. The Court of Appeals decision is squarely in conflict with the decision of this Court in *Healing v. Jones*.

In *Healing v. Jones*, the Hopi Tribe sought to evict all Navajo Indians who had been settled on a reservation which had been established in 1882 "for the use and occupancy of the Moqui [Hopi], and such other Indians as the Secretary of the Interior may see fit to settle thereon." 210 F. Supp. at 129. In that case, the United States District Court for the District of Arizona held, and

this Court affirmed, that the Hopi Tribe, as the tribe which was named in the 1882 Executive Order, had a one-half interest in all lands which were possessed exclusively by Navajos, while the Navajo Tribe, as the "other Indians" referred to in the 1882 grant, enjoyed only the remaining one-half interest in lands exclusively occupied by Navajos. In the circumstances presented inside the 1882 Reservation, the roles of the Navajo and Hopi Tribes were the reverse of those which appear in the present case (*i.e.*, the 1882 Executive Order identified the Hopi Indians as the "named" tribe and the Navajo Tribe's rights were derived from an "other Indians" provision, while the Navajo Boundary Act named the Navajo Tribe and it is the Hopi Tribe which is claiming rights as "other Indians"), but the same rule of law should be applied to both situations.

The *Healing* decision has profoundly touched the lives and homes of countless Navajo people, since thousands of them are being uprooted and forced to relocate from the homes which they and their ancestors have occupied for generations.[11] The Navajos simply do not understand why they are not entitled to the benefit of the same legal principle which has been such a burden to them. Indeed, regardless of past hardships, there is simply no plausible explanation why the Federal Courts should not even-handedly and uniformly apply a single rule to both Tribes.

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[11]Approximately 5,600 Navajos will be forced to relocate "from the only homes they have ever known." *See Proposed Amendments Relating to the Relocation of Certain Hopi and Navajo Indians Pursuant to the Act of December 22, 1974: Hearings on S. 751 and S. 1077 Before the Select Comm. on Indian Affairs, 96th Cong., 1st Sess. 36, 80-81. (1979). Cf.* Schifter and West, *Healing v. Jones: Mandate for Another Trail of Tears?* 51 *N. Dak. L. Rev.* 73 (1974).

Thus, the decision of the Court of Appeals is not only of legal significance, but also of personal significance to the lives of the people affected and to their perception of evenhanded justice. In the circumstances, this Court should review the decision of the Court of Appeals.

CONCLUSION

For the foregoing reasons, Petitioner Peter MacDonald, for and on behalf of the Navajo Tribe of Indians, respectfully prays that a Writ of Certiorari be issued to review the decision of the Court of Appeals entered on May 23, 1980, as to the questions presented herein.

Respectfully submitted,

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August 21, 1980

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. Civ. 74-842 Pct. WPC

[April 5, 1978]

Abbott SEKAQUAPTEWA, Chairman of the Hopi Tribal Council of the Hopi Indian Tribe, for and on behalf of the Hopi Indian Tribe and all villages, clans, and Individual members of the Hopi Tribe,

Plaintiff,

v.

Peter MacDONALD, Chairman of the Navajo Tribal Council of the Navajo Indian Tribe, for and on behalf of the Navajo Indian Tribe and all villages, clans, and Individual members of the Navajo Tribe,

Defendant.

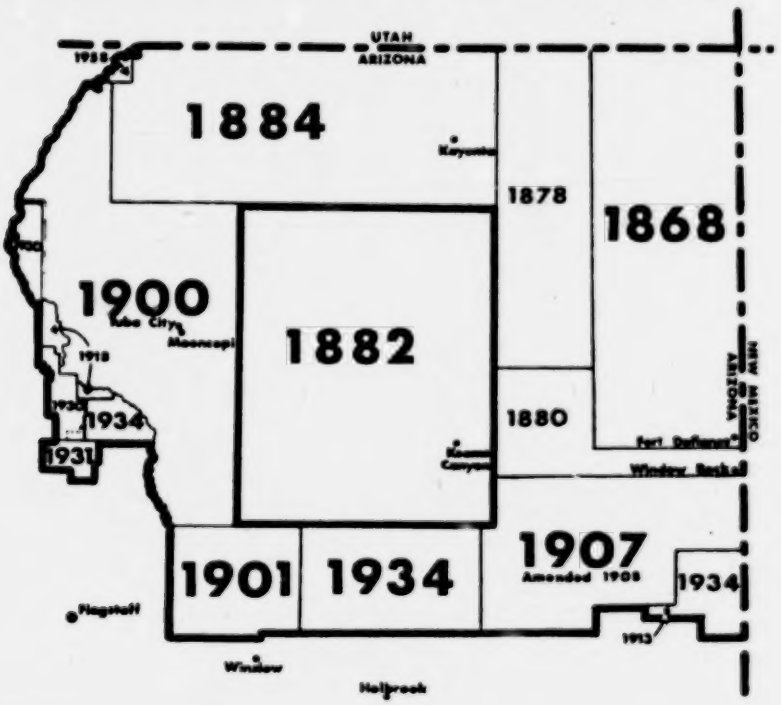
John S. Boyden, George J. Romney, Scott C. Pugsley of Boyden, Kennedy, Romney & Howard, Salt Lake City, Utah, Philip E. von Ammon, Donald R. Gilbert of Fennemore, Craig, von Ammon & Udall, Phoenix, Ariz., for plaintiff.

Paul F. Eckstein, Terry E. Fenzl of Brown & Bain, Phoenix, Ariz., Richard Schifter of Fried, Frank, Harris, Shriver & Kampelman, Washington, D.C., for defendant.

MEMORANDUM AND ORDER

COPPLE, District Judge.

Pursuant to 25 U.S.C. § 640d-7, the Hopi tribal chairman commenced an action in this district to determine the Hopi tribal rights and interests in the area described by the Act of June 14, 1934, 48 Stat. 960 (1934 Act). The 1934 Act describes the exterior boundaries of the Navajo Reservation in northeastern Arizona, and conveys an equitable interest in certain of these lands to the Navajo and "such other Indians as may already be located thereon." Before passage of the 1934 boundary bill, this area consisted of a patchwork of treaty, legislative, and executive order reservations.[1] The Hopi and Navajo tribes stipulate to the admission of the following map



[1] The 1868 rectangle was made a part of the Navajo Reservation by treaty. Treaty with the Navajos, June 1, 1868, 15 Stat. 667.

[footnote continued]

to illustrate the area. Events surrounding the 1882 rectangle, although not directly related to this case, form the backdrop of this suit. The 1882 parcel was withdrawn by Executive Order of December 16, 1882, for the benefit of the Hopi tribe and "such other Indians as the Secretary of the Interior may see fit to settle thereon." The 1934 Act does not affect the status of the 1882 Reservation, which is the subject of continuing litigation in another court within this district. *See Healing v. Jones,* 210 F. Supp. 125 (D. Ariz. 1962), *aff'd,* 373 U.S. 758, 83 S. Ct. 1559, 10 L. Ed. 2d 703 (1963). *Healing* documents both the bitter antagonism between the Navajo and the Hopi and the difficulties attending a judicial resolution of Navajo-Hopi land controversies. *See Hamilton v. MacDonald,* 503 F.2d 1138 (9th Cir. 1974).

This action is now before the Court upon the Navajos' motion to dismiss certain allegations in the amended complaint,[2] and on cross-motions for partial summary judgment regarding the meaning of the 1934 Act.[3]

By executive order, other parcels were set apart as additions to the Navajo Reservation or for Indian purposes. *See, e.g.,* Exec. Order of Oct. 29, 1878; Exec. Order of Jan. 6, 1880; Exec. Order of May 17, 1884; Exec. Order of Jan. 8, 1900. Congress added lands to the Western Navajo Indian Reservation, and created the Canyon de Chelly National Monument. Act of May 23, 1930, 46 Stat. 378; Act of Feb. 14, 1931, 46 Stat. 1161 (codified at 16 U.S.C. §§ 445 to 445b).

[2]Plaintiff's motion to file an amended complaint was granted in August 1977 without reaching the merits of the Navajo opposition. The defendant has not reintroduced these objections by a motion to dismiss. However, insofar as the Navajos' objections to the amended complaint rest upon jurisdictional grounds, the Court will consider these issues sua sponte.

[3]Both tribes have collected and filed volumes of documents to bolster their interpretation of the 1934 Act (hereinafter cited as

[footnote continued]

These motions raise questions of subject matter jurisdiction and collateral estoppel, and three overlapping issues as to the construction of the 1934 Act: (1) what property was granted by the 1934 Act, (2) who are the

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Navajo Ex., Hopi Ex.). These documents actually shed little light upon the meaning of the 1934 land grant. Nonetheless, both tribes have objected to the admission of certain evidence.

On a motion for summary judgment, a district court "can consider any material that would be admissible or usable at trial." C. Wright & A. Miller, Fed. Prac. and Pro.: Civil §§ 2721, 2722; 6 Moore's Fed. Prac. ¶ 56.11 [1.-8]. Of course, Rule 56 does not relieve counsel from laying a proper evidentiary foundation. *United States v. Dibble*, 429 F.2d 598 (9th Cir. 1970). For example, the Court cannot consider witness interviews presented by the Hopi tribe because they are not properly authenticated. *See* Hopi Ex. 233, 234, 235 and 236. The major objections of the tribes presented raise issues of relevancy. Statutory construction often requires a district court to explore "the circumstances under which the statute passed, the mischief at which it was aimed, and the object it was supposed to achieve." C. Sands, Statutes and Statutory Construction § 48.03 (4th ed. 1972). Therefore, historical material bearing upon the Hopi-Navajo land disputes are relevant to this motion. Moreover, these historical documents fall within an exception to the hearsay rule. Fed. R. Evid. 803(16). However, statements made by Indian representatives or administrative officials which are not contemporaneous with the passage of the 1934 Act fall into a different category. *See Healing v. Jones*, 210 F. Supp. 125, 142-43 (D. Ariz. 1962), *aff'd*, 373 U.S. 758, 83 S. Ct. 1559, 10 L. Ed. 2d 703 (1963). The 1934 land grant was applicable to the particular situation then existing, and subsequent events or interpretations cannot diminish or enlarge the effect of the 1934 Act. *Cf.* C. Sands, *supra* § 49.02. The Court will therefore not consider evidence regarding events long after passage of the 1934 Act. *See, e.g.*, Hopi Ex. 227 to 293.

Beyond these general comments, the Court need not embark on the time-consuming task of ruling on each of the over 100 exhibits objected to. The admissibility of the bulk of the documents is stipulated to. The Court will explicitly cite which documents among these that are relied upon in the text. For purposes of appeal, the Court adds that even assuming all the proffered exhibits are admitted, the Court's conclusions would not differ.

holders of the vested equitable interests in the 1934 Act lands, and (3) what is the nature and extent of their respective holdings.[4] Each question will be discussed seriatim.

A. Subject Matter Jurisdiction

The original complaint, brought by the tribal chairman on behalf of the Hopi tribe, simply requests a declaration of Hopi rights in the area described by the 1934 Act. *See* 25 U.S.C. § 640d-7(a). The amended complaint differs in three ways. First, the amended complaint alleges a broader representational capacity for the tribal chairman. The chairman is now representative of the tribe, villages, clans, and individual members of the tribe. Next, a second claim for relief requests a partition of lands the Court may find jointly held by the Navajo and Hopi. Finally, a third claim for relief asks for an accounting for all Navajo activities on land found to be exclusively or jointly held by the Hopi tribe. The Navajos argue that the amended complaint exceeds the subject matter jurisdiction conferred on the Court. 25 U.S.C. §§ 640d to 640d-20.

The statute granting federal jurisdiction over the Hopi-Navajo land dispute within the 1882 Reservation authorized the tribal chairman to represent both tribe, villages, clans, and individual Indians. Act of July 22, 1958, Pub. L. No. 85-547, 72 Stat. 403; *see Healing v. Jones,* 174 F. Supp. 211 (D. Ariz. 1959). The jurisdictional statute for this dispute is narrower in representational terms. 25 U.S.C. § 640d-7(a) ("Either

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[4]An understanding of these issues is aided by a general knowledge of the nature of tribal property rights. *See generally* F. Cohen, Handbook of Federal Indian Law 287-312 (N. Mex. ed. 1942).

tribe, acting through the chairman of its tribal council for and on behalf of the tribe . . ."). Nonetheless, other sections of the jurisdictional statute assume a broad representational capacity. Section 640d-7(b) orders the Court to determine any lands in which the Hopi tribe, including villages, clans, and individuals, have an exclusive interest. Section 640d-17(c) authorizes supplemental actions on behalf of the tribe, villages, clans, and individual members. Construing the jurisdictional statute as a whole, the Court concludes that the alleged representational capacity is proper.

Section 640d-7(b) affirmatively requires the district court to partition any lands found to be jointly held by the Navajo and Hopi. The Court plainly has jurisdiction over the Hopi second claim for relief. The third claim for an accounting is more troublesome. Section 640d-17(c) allows supplemental actions "as may be necessary or desirable to insure the quiet and peaceful enjoyment of the reservation lands of the tribes . . . and to fully accomplish all objects and purposes of sections 640d to 640d-24." The Hopi tribe argues this section allows an action for an accounting. However, section 640d-17(c) merely codifies the equitable jurisdiction of a federal court to issue ancillary bills to effectuate a court decree. *See Hamilton v. Nakai,* 453 F.2d 152, 157 (9th Cir. 1972), *cert. denied,* 406 U.S. 945, 92 S. Ct. 2044, 32 L. Ed. 2d 332 (1972). An action for an accounting is not necessary to effectuate any decree this Court might make, or "to insure the quiet and peaceable enjoyment of the reservation lands." Moreover, the legislative directive to accomplish all purposes of the title does not detract from "the principle that the power of a court to afford a remedy must be coextensive with its jurisdiction over the subject matter." *Id.* at 156. Section 640d-7 grants the Court jurisdiction to quiet

title and partition jointly held land. Damages is not the object or purpose of the jurisdictional grant. Furthermore, Congress explicitly authorized an action for an accounting in supplemental proceedings in *Healing. See* 25 U.S.C. § 640d-17(a). Congressional silence presumably bars such a remedy in this action. Indeed, it is unlikely Congress would allow a damage remedy without first ascertaining the extent and nature of the Hopi interest in the 1934 Act lands. Otherwise, if a district court ruled the Hopi tribe has an undivided one-half interest in all the 1934 Act lands, then a concomitant damage remedy probably would obliterate the Navajo treasury. Therefore, the third claim for relief will be dismissed.

B. Collateral Estoppel

In 1951 the Hopi tribe brought an action against the United States before the Indian Claims Commission alleging the government occupied and possessed without compensation the tribe's aboriginal land. *See* 25 U.S.C. §§ 70 to 70v. "Aboriginal title" depends upon a factual determination. "[A]boriginal title must rest on actual, exclusive, and continuous use and occupancy 'for a long time' prior to the loss of the property." *Sac & Fox Tribe v. United States,* 161 Ct. Cl. 189, 315 F.2d 896, 903 (1963), *cert. denied,* 375 U.S. 921, 84 S. Ct. 266, 11 L. Ed. 2d 165 (1963); *see also Strong v. United States,* 207 Ct. Cl. 254, 518 F.2d 556, 560 (1975), *cert. denied,* 423 U.S. 1015, 96 S. Ct. 448, 46 L. Ed. 2d 386 (1975); F. Cohen, Handbook of Federal Indian Law 291-94 (N. Mex. ed. 1942). The Hopi tribe asserted an aboriginal title claim extending approximately over three-quarters of the 1934 Act lands. The Hopi action was consolidated with a petition filed by the Navajo tribe also alleging the uncompensated taking of Navajo aboriginal land.

The Indian Claims Commission denied the Hopi tribe's aboriginal title claim to all of the territory alleged. Rather, the Commission held the Hopi tribe possessed aboriginal title to a smaller area which included the 1882 Reservation. This title was extinguished without compensation as to all lands outside the 1882 Reservation when the Executive Order of December 16, 1882 issued. The Hopis' aboriginal title to land within the 1882 Reservation was extinguished partially in 1937 when the Navajo tribe was administratively settled within the area. *See Healing v. Jones,* 210 F. Supp. 125 (D. Ariz. 1962), *aff'd,* 373 U.S. 578, 83 S. Ct. 1559, 10 L. Ed. 2d 703 (1963). The Commission ordered the case to proceed to a determination of damages. *See Hopi Tribe v. United States,* 31 Ind. Cl. Comm. 16 (1973); *Hopi Tribe v. United States,* 23 Ind. Cl. Comm. 277 (1970).

The defendant claims this decision collaterally bars the Hopi tribe from asserting title to the lands litigated before the Indian Claims Commission. However, in this action the Hopi tribe seeks to quiet title to land under the doctrine of "recognized title." Recognized title differs from aboriginal title.

> Where Congress has by treaty or statute conferred upon the Indians or acknowledged in the Indians the right to permanently occupy and use land, then the Indians have a right or title to that land which has been variously referred to in court decisions as "treaty title", "reservation title", and "acknowledged title." As noted by the Commission, there exists no one particular form for such Congressional recognition or acknowledgement of a tribe's right to occupy permanently land and that right may be established in a variety of ways.

Miami Tribe v. United States, 146 Ct. Cl. 421, 175 F. Supp. 926, 936 (1959). "The significance of the

recognized title doctrine generally lies in the fact that a plaintiff successful on this issue need not present proof demonstrating aboriginal use and occupancy." *Strong v. United States, supra* at 563; F. Cohen, *supra* at 291-99. Therefore, the issues of fact and law before the Indian Claims Commission have no bearing whatsoever to this action. It is axiomatic that collateral estoppel does not apply to unlitigated and undetermined issues. 1b Moore's Fed. Prac. ¶ 0.443[1].

Nonetheless, the Navajo tribe argues that issues pertaining to the 1934 Act were decided on appeal to the Court of Claims adversely to the Hopi. The Hopi brief to the Court of Claims indicates the contrary, however.[5] The Hopi tribe argued that aboriginal title in certain lands outside the 1882 Reservation continued until 1934. The 1934 Act extinguished one-half of the Hopi interest in this territory. Hopi argument was not persuasive to the Court of Claims, who affirmed by memorandum decision the judgment of the Indian Claims Commission.[6] By necessarily concluding that Hopi aboriginal title outside the 1882 Reservation was extinguished in 1882, the Court of Claims never reached any issues concerning the 1934 Act. Collateral estoppel is inappropriate as to issues which were neither essential nor necessary to judgment. *Id.* Therefore, the Hopi tribe is not collaterally estopped in any respect from asserting property rights under the 1934 Act.

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[5]The brief is reproduced at Navajo Ex. E, Appendix to Navajo Motion for Partial Summary Judgment, *Sekaquaptewa v. MacDonald*, Civ. 74-842, Docket No. 44 (April 26, 1977).

[6]The memorandum decision is reproduced at Exhibit G, Appendix to Navajo Motion for Partial Summary Judgment, *Sekaquaptewa v. MacDonald*, Civ. 74-842, Docket No. 44 (April 26, 1977).

C. What Property Was Granted by the 1934 Act

The relevant granting clause of the 1934 Act follows:

> . . . . That the exterior boundaries of the Navajo Indian Reservation, in Arizona, be, and they are hereby, defined as follows . . . [boundary description]. *All vacant, unreserved, and unappropriated public lands, including all temporary withdrawals of public lands in Arizona heretofore made for Indian purposes by Executive order or otherwise within the boundaries defined by this Act,* are hereby permanently withdrawn from all forms of entry or disposal for the benefit of the Navajo and such other Indians as may already be located thereon; however, nothing herein contained shall affect the existing status of the Moqui (Hopi) Indian Reservation created by Executive order of December 16, 1882.

(emphasis added). Which lands were "vacant, unreserved, and unappropriated" is a question of fact not before the Court on this motion. The parties dispute which of the lands withdrawn by executive order in 1878, 1880, 1884, 1900, 1901, 1907, and 1918 were "temporary withdrawals of public lands in Arizona."

The Hopis argue that all executive order withdrawals of public land prior to June 1934 were "temporary." An executive order reservation grants an Indian tribe only a "mere temporary and cancellable possessory right." *Ute Indians v. United States,* 330 U.S. 169, 178, 67 S. Ct. 650, 654, 91 S. Ct. 823 (1947). While occupying an executive order reservation, Indians are no more than tenants at the will of the government.

> . . . the status of executive order reservations can be summarized as follows: the Indians have the exclusive right to possession but title to the lands

> remains with the United States. Congress has plenary authority to control use, grant adverse interests or extinguish the Indian title. In these respects, executive order reservations do not differ from treaty or statutory reservations. The one difference is that so long as Congress has not recognized compensable interests in the Indians, executive order reservations may be terminated by Congress or the Executive without payment of compensation.

United States v. Southern Pacific Transportation Co., 543 F.2d 676, 687 (9th Cir. 1976). The Court agrees that a "temporary withdrawal" under the 1934 Act refers to the unique status of an executive order reservation as opposed to legislatively conferred, compensable "recognized title."[7]

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[7]The Navajo tribe attempts to distinguish temporary from permanent withdrawals in a more abstract manner. The argument begins with *United States v. Midwest Oil Co.*, 236 U.S 459, 35 S. Ct. 309, 59 L. Ed. 673 (1915). In *Midwest Oil*, the Court held that the President had the power to withdraw public lands from potential mining claims pending further legislation. The Court found that Congress had granted this power to the Executive by a history of long acquiescence. The *Midwest Oil* Court rejected a distinction between temporary and permanent executive land withdrawals offered by the appellees.

> The appellees, however, argue that the practice thus approved [by Congress in the past], related to reservations,—to cases where the land had been reserved for military or other special public purposes,—and they contend that even if the President could reserve land for a public purpose or for naval uses, it does not follow that he can withdraw land in aid of legislation. When analyzed, this proposition, in effect seeks to make a distinction between a reservation and a withdrawal,—between a reservation for a purpose not provided for by existing legislation, and a withdrawal made in aid of future legislation. It would mean that a permanent reservation for a purpose designated by the President, but

[footnote continued]

The Navajo tribe argues that certain executive order withdrawals still fall outside the 1934 Act. The tribe reasons that Congress recognized title in the Navajo to

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not provided for by statute, would be valid, while a merely temporary withdrawal to enable Congress to legislate in the public interest would be invalid. It is only necessary to point out that, as the greater includes the less, the power to make permanent reservations includes power to make temporary withdrawals. For there is no distinction in principle between the two. The character of the power exerted is the same in both cases. In both, the order is made to serve the public interest, and in both the effect on the intending settler or miner is the same.

Id. at 475-76, 35 S. Ct. at 314. Congress has since eliminated any implied Executive withdrawal power. Fed. Land Policy and Management Act of 1976, Pub. L. No. 94-579 § 704 (a), 90 Stat. 2743.

Midwest Oil concerned a controversy which arose before passage of the Pickett Act in 1910. Act of June 25, 1910, 36 Stat. 847 (codified at 43 U.S.C. §§ 141 to 143), *repealed* Fed. Land Policy and Management Act of 1976, Pub. L. No. 94-579 § 704(a), 90 Stat. 2743. The Pickett Act expressly authorized the President to "*temporarily withdraw* from settlement, location, sale, or entry any of the public lands . . . and reserve the same for . . . public purposes to be specified in the orders of withdrawals." 43 U.S.C. § 141 (emphasis added). Lands withdrawn under the Pickett Act remained open to "exploration, discovery, occupation, and purchase under the mining laws." *Id.* § 142. After passage of the Pickett Act, the question arose whether the President could withdraw lands so that they would not be subject to the mining laws. Then Attorney General Robert Jackson argued that the President could withdraw lands which were not subject to mining claims. 40 Op. Att'y Gen. 73 (1941). Jackson reasoned that the Pickett Act legislated only as to temporary withdrawals, and did not touch permanent executive order withdrawals.

It is desirable to point out preliminarily that there is a recognized difference between the two kinds of withdrawals. It is true the Supreme Court stated in the *Midwest* case . . . that there was no distinction in principle between a permanent reservation and a temporary withdrawal. But it seems clear the Court was referring to the question of power, not to types of withdrawal. The Court referred to differing factual

[footnote continued]

some areas within the 1934 boundary bill before its passage. For example, an Appropriations Act of May 27, 1902, 32 Stat. 264, recognized a Navajo compensable

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situations in which one type is used and not the other. Thus it gave instances of withdrawals in aid of legislation (pp. 476-80 [35 S. Ct. 309]), and of withdrawals for reservations for public uses (pp. 470-1. [35 S. Ct. 309]), the latter including withdrawals for the establishment of bird refuges, enlargement of Indian or military reservations, the setting aside of land for water, timber, fuel, hay, signal stations, and target ranges.

Id. at 76. Exploring the legislative history of the Pickett Act, Jackson concluded:

> When lands are withdrawn temporarily for a purpose coming within the 1910 Act, those lands are subject to the terms of that act and accordingly said mining laws apply. If, however, the lands are not withdrawn temporarily for a purpose within the 1910 Act, but for permanent use by the Government for other and authorized uses, the mining laws made applicable to lands withdrawn under the 1910 Act do not apply . . . . *This is so notwithstanding the withdrawal now contemplated and any other permanent withdrawal may be temporary in the very broad sense that they may be subsequently revoked by the President or by Congress.*

Id. at 81 (emphasis added). Apparently, the Jackson view is accepted in this circuit.

> Thus "temporary" and "permanent" do not have meanings in terms of time. Rather they are words which go to the nature of the withdrawal. A withdrawal of lands and their reservation for a present use rendered necessary for the discharge of the responsibilities vested in the Executive branch of the Government is said to be permanent. These reservations have been made for such purposes as post offices, military and Indian reservations, light houses, and the like. A withdrawal of lands for a public purpose, as distinguished from use, is said to be temporary.

J. Lowe, *Withdrawals and Similar Matters Affecting Public Lands*, 4 Rocky Mt. Min. L. Inst. 55, 62 (1958), *cited approvingly*, *United States v. Consolidated Mines & Smelting Co., Ltd.*, 455 F.2d 432, 444-45 (9th Cir. 1971).

[footnote continued]

interest in the area withdrawn by the Executive Order of Jan. 8, 1900. The Act of March 3, 1927, 44 Stat. 1347 (codified at 25 U.S.C. § 398d), which froze the boundaries of all executive order reservations, recognized Navajo title in other executive order reservations within the 1934 Act boundaries.

The Jackson distinction between temporary and permanent withdrawals was echoed by Felix Cohen, acting solicitor to the Department of the Interior, in a memorandum on the "Validity of Orders Temporarily Withdrawing Public Land in Aid of Legislation Looking to the Establishment of Indian Reservations."

> . . . when the word "temporary" is used with respect to withdrawals in aid of legislation, the word "temporary" is used in contradistinction to the word "permanent." The executive practice upheld in the *Midwest Oil Co.* case embraced two types of public land withdrawals—permanent withdrawals intended to be effective immediately for the purposes for which the lands were withdrawn, and temporary withdrawals such as those now under consideration, in which public land was withdrawn for the purpose of maintaining the status of the land free of private claims until such time as the Congress itself had taken action.

60 I.D. 54, 56-57 (1947). On the basis of these distinctions, the Navajo tribe argues that certain executive order withdrawals within the 1934 Act boundaries were permanent ones, and, therefore, not granted by the 1934 Act. For example, the Executive Order of October 29, 1878, states:

> It is hereby ordered that the tract of country in the Territory of Arizona lying within the following described boundaries . . . be, and the same hereby is, withdrawn from sale and settlement and set apart as an addition to the present reservation for the Navajo Indians.

The Navajo tribe characterizes this executive order withdrawal as a withdrawal for immediate present use, and, thereofre, a "permanent" withdrawal.

The Court is not persuaded that the Jackson distinction is a meaningful one to apply to the 1934 Act. After all, the distinction arose from an Executive attempt to justify land withdrawals seemingly at odds with legislative directives. The 1934 Act states that

[footnote continued]

The issue raised is whether Congress recognized rights of permanent occupancy before the 1934 Act?

> An Indian Reservation created by Executive Order of the President conveys no right of use or occupancy to the beneficiaries beyond the pleasure of Congress or the President. Such rights may be terminated by the unilateral action of the United States without legal liability for compensation in any form even though Congress has permitted suit on the claim. . . . When a reservation is established by a treaty ratified by the Senate or a statute, the quality of the rights thereby secured to the occupants of the reservation depends upon the language or purpose of the Congressional action. Since Congress, under the Constitution, § 3 of Art. IV, has the power to dispose of the lands of the United States, it may convey to or recognize such rights in the Indians, even a title equal to fee simple, as in its judgment is just. . . . *When Congress intends to delegate power to turn over lands to the Indians permanently, one would expect to and doubtless would find definite indications of such a purpose.*

Hynes v. Grimes Packing Co., 337 U.S. 86, 103-04, 69 S. Ct. 968, 979, 93 L. Ed. 1231 (1949) (emphasis

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"All . . . temporary withdrawals of public lands in Arizona heretofore made for Indian purposes by Executive order . . . are hereby permanently withdrawn . . . ." Considering the juxtaposition of "temporary" and "permanent" with the 1934 Act, it is reasonable to assume Congress intended to change the Indian land status from a tenancy at will to a permanent compensable interest. Although the legislative history of the 1934 Act is silent as to this question of construction, there is no indication whatsoever that any of the prior executive order withdrawals were excluded from the 1934 grant. If Congress intended to legislate as to one type of withdrawal and not to the other, the Court would expect some expression of this purpose. Therefore, the Court will not apply the Jackson distinction between permanent and temporary executive order withdrawals.

added). The legal standard for recognized title rests upon the clear intent of Congress. "There is no particular form for congressional recognition of Indian right of permanent occupancy. It may be established in a variety of ways but there must be the definite intention by congressional action or authority to accord legal rights, not merely permissive occupancy." *Tee-Hit-Ton Indians v. United States,* 348 U.S. 272, 278-79, 75 S. Ct. 313, 317, 99 L. Ed. 314 (1955).

The Navajo tribe suggests that land withdrawn by the Executive Order of January 8, 1900, was permanently reserved by Congress. This congressional intent can be found in the Appropriations Act of May 27, 1902, 32 Stat. 264. This act provides for the purchase of the title of certain settlers located at Tuba City within the 1900 executive order reservation. In particular, the appropriations allowed the Secretary of the Interior to purchase the rights and improvements of about 20 Morman [*sic*] families at Tuba City. On its face, this statute does not show a "definite intention by congressional action or authority to accord legal rights." Moreover, nothing in the legislative history cited by the Navajo tribe indicates such a clear purpose. Indeed, the Navajo position leads to an anomalous result. The Hopi village of Moencopi is within the 1900 executive order reservation. One stumbling block to passage of the 1934 Act was the presence of this Hopi village. The Navajo tribe would read the status of the Meoncopi village completely out of the 1934 Act.

The Act of March 3, 1927, 44 Stat. 1347, states:

> Changes in the boundaries of reservations created by Executive order, proclamation, or otherwise for the use and occupation of Indians shall not be made except by Act of Congress . . . .

(codified at 25 U.S.C. § 398d); *see also* Act of May 25, 1918, 40 Stat. 570 (codified at 25 U.S.C. § 211) ("No Indian reservations shall be created, within the limits of the States of New Mexico and Arizona, except by Act of Congress."). A law review writer has argued that the 1927 Act is a congressional recognition of compensable tribal property interests in executive order reservations. Note, *Tribal Property Interests in Executive Order Reservations: A Compensable Indian Right,* 69 Yale L.J. 627 (1960). The Navajo tribe argues the Court should adopt the views of this article. The question is one of first impression. *Cf. United States v. Southern Pacific Transportation Co., supra* at 687.

In *Healing v. Jones,* 174 F. Supp. 211 (D. Ariz. 1959), the Court either implicitly rejected or overlooked the argument that compensable interests were created by the 1927 Act. The *Healing* Court held that equitable interests in the 1882 executive order reservation were not vested until congressional recognition in 1958. *Id.* at 216; Note, *supra* at 639. Whether by oversight or omission, the *Healing* Court is correct. On its face, the 1927 Act does not show a "definite intention by congressional action or authority to accord legal rights." Rather, the Act merely limits executive rights and clearly defines congressional initiative. From the bulky legislative history of the 1927 Act, the only direct evidence as to congressional intent comes with the House Report to a prior version of the Act which was vetoed by the President on other grounds.

> Nothing in this bill is intended to in any manner change or alter the ownership or legal and equitable title to the lands described by its terms. The question of what rights the Indians may have in and to Executive order reservations will not be affected by

> its passage and the courts can squarely decide that issue without reference to this legislation.

H.R. Rep. No. 763, 69th Cong., 1st Sess. (1926). The House and Senate Reports on the final 1927 Act are silent on the issue of recognized title. *See* S. Rep. No. 1240, 69th Cong., 2d Sess. (1927); H.R. Rep. No. 1791, 69th Cong., 2d Sess. (1927). Although the Navajo tribe can point to language of individual members of Congress expressing a concern to vest permanent rights to the Indians, these speeches are hardly dispositive. C. Sands, Statutes and Statutory Construction § 48.13. Therefore, the Court concludes that the 1927 Act recognized no compensable property interests in the Indian tribes on executive order reservations.

D. Who Are the Holders of the Vested Equitable Interests

The granting clause of the 1934 Act states:

> . . . [description of lands], are hereby permanently withdrawn from all forms of entry or disposal for the benefit of the Navajo and *such other Indians* as may already be located thereon; however, nothing herein contained shall affect the existing status of the Moqui (Hopi) Indian Reservation created by Executive order of December 16, 1882.

(emphasis added). As a named grantee, the Navajo tribe is one holder of the equitable interests. The Court takes judicial notice that a Hopi village existed at Moencopi on June 14, 1934. Moencopi is within the 1934 Act land grant, and, therefore, the Hopi are within the "such other Indians" clause and are holders of equitable interests.

The issue arises whether any other Indian tribe may be a grantee within the meaning of the 1934 Act? The Hopi

tribe urges the Court to rule that, as a matter of law, the Hopi are the only "other Indians" referred to by the 1934 Act. After all, the legislative history to the 1934 Act demonstrates a congressional concern solely for the Hopi and Navajo tribes. The defect in the Hopi argument is that Congress was capable of naming the Hopi tribe if it wished to limit the grant solely to the Hopi and Navajo. The Court declines to reach this issue. This action only requires the Court to decide between the competing claims of the Navajo and Hopi. 25 U.S.C. § 640d-7. The Court holds below that the Hopi interest in the 1934 Act lands is tied to Hopi occupation, possession, or use of the lands on June 14, 1934. Inasmuch as an Indian tribe's presence within the 1934 area does not vest a proportionate undivided interest in the entire 1934 reservation, the Court need not decide whether the Hopis are the sole "other Indians" under the 1934 Act.

E. What Is the Nature and Extent of the Holdings

The granting clause of the 1934 Act withdraws land "for the benefit of the Navajo and such other Indians as may already be located thereon." The Hopi tribe argues that the words "as may already be located thereon" merely designate the recipients of the 1934 Act. The Navajo tribe argues that these words both designate the grantees and limit the interest of the grantees to parcels of land actually occupied on June 14, 1934.

> Any words in a conveyance which operate to designate a conveyance are called "words of purchase" . . . . In contrast therewith, any words in a conveyance which operate to designate the extent of the interest acquired by a conveyee are called "words of limitation."

Restatement Property § 312 Intro. Note. The issue, therefore, is whether "as may already be located thereon" are words of limitation or words of purchase or both? The Court must first look to the language of the statute to resolve the question. *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 197, 96 S. Ct. 1375, 47 L. Ed. 2d 668 (1976).

The plain wording of the 1934 Act is ambiguous. For example, the 1934 Act grants an equitable interest in "vacant, unreserved, and unappropriated" public lands. Vacant lands are those lands which are absolutely free, unclaimed, and unoccupied. *Donley v. Van Horn,* 49 Cal. App. 383, 193 P. 514, 517 (1920). Under the Navajo interpretation of the 1934 Act, Congress granted an equitable interest in these vacant lands to the Hopi only if the Hopi occupied the land. The condition nullifies the grant. If Congress wished to limit the "such other Indian" grant to land actually occupied, Congress could do so in plainer language. *See Missionary Society v. Dalles,* 107 U.S. 336, 339, 2 S. Ct. 672, 27 L. Ed. 545 (1882) (1848 Act confirms and establishes title to certain land occupied by missionaries, not exceeding 640 acres, on the date of enactment); *cf. Tee-Hit-Ton Indians v. United States, supra,* 348 U.S., at 291, 75 S. Ct. 1313 (Douglas, J., dissenting) (1884 Organic Act for Alaska states Indians shall not be disturbed in possession of lands actually in their use and occupancy). The Hopi interpretation is also troublesome. The title of the 1934 Act states "Exterior Boundaries of Navajo Reservation in Arizona." Nonetheless, the Hopi tribe claims an undivided one-half interest in most of the reservation.

The congressional record on the 1934 Act is sparse. The Senate and House reports, which largely incorporate an explanatory letter from the Secretary of the Interior, are of little guidance. The Secretary addresses Hopi land rights in one terse sentence.

> It is of importance to observe that section 1 (p. 4, lines 12 to 14, inclusive) contains a provision safeguarding the rights of the Hopi Indians to their lands, which are centrally located within the present Navajo Reservation.

S. Rep. No. 1012, 73d Cong., 2d Sess. 2 (1934); H.R. Rep. No. 1602, 73d Cong., 2d Sess. 2 (1934). However, page 4, lines 12 to 14, merely preserves the existing status of the 1882 Hopi Reservation. *See* H.R. 8927, 73d Cong., 2d Sess. (April 3, 1934). The Congress is silent as to the meaning of the preceding "such other Indians" clause.

Apparently, only one legislative hearing was held on the boundary bill in 1932. *See A Proposed Bill to Define the Exterior Boundaries of the Navajo Reservation in Arizona: Hearing on S. 2213 Before the Senate Comm. on Indian Affairs,* 72d Cong., 2d Sess. (1932). The hearings concerned a bill proposed by the Bureau of Indian Affairs relating to Hopi-Navajo segregation.[8] *Id.* at 3. The bill not only contained the "such other Indians as may already be located thereon" clause, but also authorized the Secretary of the Interior to set apart from time to time lands within the boundary bill for the exclusive use and benefit of the Hopi. *Id.* at 4. The proposed bill made no mention of the 1882 Hopi Reservation. No senator expressed his views on the meaning

[8]Senators Hayden and Bratton originally introduced a bill to eliminate "checkerboard" control of the lands in northeastern Arizona and New Mexico between Indian and private landowners. S. 5557, 71st Cong., 3d Sess. (Jan. 5, 1931). No action was taken on this bill pending further study upon the area. *See Report of H. J. Hagerman on the Navajo Indian Reservation,* S. Doc. No. 64, 72d Cong., 1st Sess. (1932). The proposed bill of the Bureau of Indian Affairs not only eliminated checkerboard ownership of the land, but also provided a comprehensive solution to the persistent problems between the Navajos and the Hopis.

of the "such other Indians as may already be located thereon" language; however, the Assistant Commissioner of Indian Affairs submitted for the record minutes of four meetings between administrators of the Indian Bureau and representatives of the Hopi villages. At these meetings, the Indian Bureau explained the "whole meaning of this bill." *Id.* at 29.

The first meeting took place on the First Mesa with members of the Tewa, Sichumovi, and Walpi villages.

> Mr. Stewart: Now we are going back to section 1 of the bill, especially that part reading that the lands in those lines are to be permanently for the benefit of the Navajos and such other Indians as may already be located thereon. Now I want you to especially bear in mind that by the "as may already be located thereon" that is put in the bill to especially protect the rights of the Hopi Indians to the lands they occupy around here and there is absolutely no chance of the Hopis' rights to these lands being disturbed.
>
> Now we are going on to that part reading: "*Provided further,* That the Secretary of the Interior is hereby authorized to determine and set apart from time to time for the exclusive use and benefit of the Hopi Indians, such areas within the Navajo boundary line above defined as may in his judgment be needed for the use of said Indians."
>
> I will explain to you that this means that at any time in the future if the Hopi Indians want a separate boundary line for themselves the Secretary of the Interior can set that aside. I want to assure you that it only contemplates a separate Hopi boundary line if the Hopi Indians themselves want it. As Mr. Radcliffe explained a little while ago, suggestions have been made to us by our own field men and white persons outside the Indian Service

who are apparently friendly to the Hopis that certain lines should be adopted as their permanent boundary lines. Those lines involve this one large area here which covers all of these villages and the lands the Hopis have been using. . . . That area covers about 500,000 acres and in addition to that area it has been suggested that an area of about 32,000 acres be set aside for the use of Moencopi Wash Hopi Indians.

Mr. Radcliffe: The area on the Moencopi Wash is outside the Hopi reservation.

Mr. Stewart: Should the Hopi Indians decide that they want separate boundaries we propose to fence the lands that are set aside for them.

* * *

Id. at 34-35. A similar explanation was given at each subsequent meeting. *See id.* at 39 (Minutes of meeting at Second Mesa, villages of Mishongovi and Shipaulovi) ("Now I want especially for you to bear in mind that by the 'as may already be located thereon' that is put in the bill to especially protect the rights of the Hopi Indians to the lands they occupy around here and there is absolutely no chance of the Hopis' rights to these lands being disturbed"); *id.* at 54 (Minutes of meeting at Third Mesa, Oraibi village) ("We put that phrase 'and such other Indians as may already be located thereon' in the bill so as to protect especially the rights of the Hopi Indians to what is called their reservation"); *id.* at 68 (Minutes of meeting at Third Mesa, villages of Hotevilla and Bacabi) ("That phrase 'and such other Indians as may already be located thereon' was especially put in this bill so as to protect the rights of the Hopi Indians in there to this so-called Hopi Reservation. In other words, to protect their rights to the land they are now using and occupying. I want to emphasize

that fact, that the bill as now drawn does not in any way affect or change the present so-called Hopi Reservation"). This administrative interpretation of the boundary bill was presented to the Senate, and presumably, is consistent with the congressional understanding of the 1934 Act.

The proposed bill of the Bureau of Indian Affairs did not preserve the 1882 executive order reservation. The "as may already be located thereon" language was added to protect Hopi property rights. Commissioner of Indian Affairs Rhoads explains the addition in a letter of September 22, 1932, to M. Billingsley, a friend of the Hopi:[9]

> Regarding your view that the present proposed bill does not define any particular area for the Hopis, and hence will give title to all the lands to the Navajo—including the present Hopi areas— . . . there is enclosed our revised copy of the bill . . . .
>
> Your particular attention is invited . . . [to these lines] reading as follows:
>
> > Are thereby permanently withdrawn from all forms of entry or disposal for the benefit of the Navajo and such other Indians as may already be located thereon.
>
> It will be readily seen that this language will fully protect the rights and interests of the Hopi Indians within the area covered by the proposed bill until such time as the Hopi Indians themselves agree to some definite boundary, which we hope will be somewhat along the lines indicated on the enclosed blue prints.

See also Letter from C. J. Rhoads to Otto Lomavitu (Sept. 24, 1932) (change was made to fully protect rights

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[9]The letter is reproduced at Navajo Ex. 94.

and interests of Hopi Indians within the area).[10] The new clause did not quiet the controversy, however. After the 1932 congressional hearing, the Bureau eliminated all reference to a segregated area for the Hopi Indians and added a proviso that the bill would not affect the status of the 1882 Hopi Reservation. Letter from Ray Wilbur to M. Billingsley (Jan. 5, 1933); Letter from Henry Scattergood to Edgar Miller (Jan. 14, 1933).[11]

After Senator Hayden introduced an amended Navajo boundary bill in February 1933, no mention was made of the Hopi-Navajo land dispute. S. 5696, 72d Cong., 2d Sess. (Feb. 28, 1933). Although no longer affecting the status of the 1882 Hopi Reservation, the new bill continued to withdraw the land "for the benefit of the Navajo and such other Indians as may already be located thereon." The only meaning this clause could plausibly be given in light of the legislative history is to protect the rights and interests of the Hopi tribe to the land they were occupying and using outside the 1882 Reservation on June 14, 1934. Inasmuch as the 1934 Act did not attempt to separate Hopi and Navajo property interests, the Hopi tribe and the Navajo tribe each received an undivided one-half interest in these lands. However, the Navajo attempt to limit Hopi rights and interests to land actually occupied by the Hopi is misplaced. The 1934 Act protects both Hopi occupancy and land use. For example, grazing land and religious shrines may fall within the scope of the land grant to the Hopi. These issues present a mixed question of law and fact, however, and the Court will not rule at this time on what types of land uses are sufficient to create a property interest

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[10]The letter is reproduced at Navajo Ex. 95.

[11]These letters are reproduced at Navajo Ex. 101 and 102.

under the 1934 Act. After discovery, the Court can determine which kinds of Hopi possession or use on June 14, 1934 were substantial enough to create property rights within the area set aside by the boundary bill. Therefore,

IT IS ORDERED:

1. The Navajo tribe's motion to dismiss the third claim for relief is granted.

2. The Navajo tribe's motion to dismiss the amended complaint is denied in all other respects.

3. The Hopi tribe's motion for summary judgment is denied.

4. The Navajo tribe's motion for summary judgment is granted insofar as it is consistent with this memorandum and order.

5. Counsel for the Navajo tribe will prepare a form of judgment consistent with this opinion, approved by the Hopi tribe as to form only, and lodge it with the Court within ten (10) days from the filing of this order.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 78-3504, 78-3505
(Consolidated)

ABBOTT SEKAQUAPTEWA, Chairman of the Tribe, for and on behalf of the Hopi Indian Tribe and all villages, clans, and individual members of the Hopi tribe,

Appellant-Cross-Appellee,

v.

PETER MacDONALD, Chairman of the Navajo Tribal Council of the Navajo Indian Tribe, for and on behalf of the Navajo Indian Tribe and all villages, clans, and individual members of the Navajo Tribe,

Appellee-Cross-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

OPINION

Before: Anderson and Skopil, Circuit Judges, and Bonsal,* District Judge

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*The Honorable Dudley B. Bonsal, Senior United States District Judge for the Southern District of New York, sitting by designation.

SKOPIL, Judge:

These are interlocutory cross-appeals from a partial summary judgment in a quiet title action. The action was brought to determine the respective property interests of the Navajo and Hopi tribes in the reservation withdrawn by the act of June 14, 1934, 48 Stat. 960 (hereafter "the 1934 Act"). We are also asked to decide whether the district court had jurisdiction over the Hopi claim for an accounting for all Navajo activities on land in which the Hopi Tribe has an interest. We affirm in part and reverse in part.

The Hopis have inhabited the area in controversy "[a]s far back as the Middle Ages." *Healing v. Jones,* 210 F. Supp. 125, 134 (D. Ariz. 1962), *aff'd,* 373 U.S. 758 (1963). The Navajos probably entered the area in the last half of the eighteenth century. *Id.* By treaty in 1868 the United States granted the Navajos an extensive reservation in the northeast corner of Arizona. 15 Stat. 667. The reservation was gradually expanded by a series of executive orders beginning in 1880 and continuing to 1918. An 1882 executive order withdrew a reservation (hereafter "the 1882 reservation") for the Hopis "and such other Indians as the Secretary of the Interior may see fit to settle thereon". Title to this reservation, on which the Navajos and Hopis are intermingled, has been extensively litigated in a separate line of cases.[1]

Neither the 1868 treaty reservation nor the 1882 reservation is at issue here. The lands at issue are those

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[1] *See Healing v. Jones,* 174 F. Supp. 211 (D. Ariz. 1959); *Healing v. Jones, supra,* 210 F. Supp. 125; *Hamilton v. Nakai,* 453 F.2d 152 (9th Cir. 1972), *cert. denied* 406 U.S. 945 (1972); *Hamilton v. MacDonald,* 503 F.2d 1138 (9th Cir. 1974); *Sekaquaptewa v. MacDonald,* 544 F.2d 396 (9th Cir. 1976); *Sekaquaptewa v. MacDonald,* 575 F.2d 239 (9th Cir. 1978).

withdrawn by other executive orders from 1880 to 1918. These lands became known as the Navajo reservation. Hereafter we refer to this area as "the Reservation". They surround the 1882 executive order reservation.[2]

A 1934 Act of Congress, 48 Stat. 960, defined the exterior boundaries of the Reservation. The Act provided, *inter alia:*

> All vacant, unreserved, and unappropriated public lands, including all temporary withdrawals of public lands in Arizona heretofore made for Indian purposes by Executive order or otherwise, within the boundaries defined by this Act, are hereby permanently withdrawn from all forms of entry of disposal for the benefit of the Navajo and such other Indians as may already be located thereon; however, nothing herein contained shall affect the existing status of the Moqui (Hopi) Indian Reservation created by Executive order of December 16, 1882.

In 1974 Congress authorized both tribes to sue "for the purpose of determining the rights and interests of the tribes in and to [the lands covered by the 1934 Act] and quieting title thereto in the tribes". 25 U.S.C. § 640d-7 (hereafter "the 1974 jurisdictional act").

I. PROCEEDINGS BELOW

The Hopis filed this action. Their amended complaint requests: (1) a declaration that the Hopies have an undivided one-half interest in the lands at issue; (2) that jointly held lands be partitioned; and (3) that the court order an accounting for all Navajo activities on all land in which the Hopis have an interest.

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[2]This land was involved in *Sekaquaptewa v. MacDonald,* 591 F.2d 1289 (9th Cir. 1979).

The district court limited the proceedings to a determination of the nature of the title conferred in the 1934 Act. Following discovery the parties filed cross motions for summary judgment. In a thorough opinion the district court held that it had jurisdiction of the first two claims but not of the accounting claim. It declared that the Hopi Tribe has an undivided one-half interest in all land it "possessed, occupied or used" in 1934. It declared further that the Navajo Tribe has (1) an undivided one-half interest in all reservation land "possessed, occupied or used" by the Hopis in 1934; and (2) exclusive trust title to the rest of the reservation. The district court took no action on the claim for partition, pending final resolution of title. It also did not identify specific lands "possessed, occupied or used" by the Hopis in 1934. We granted leave to appeal under 28 U.S.C. § 1292(b).

II. DISCUSSION

We must first address the broad question of what rights were conferred by the 1934 Act. Two subordinate issues must be settled to resolve the broader question:

(1) What parts of the Reservation were "vacant, unreserved, and unappropriated Public lands, including all temporary withdrawals of public lands in Arizona heretofore made by executive order"?

(2) What property interests are conferred by the phrase "for the benefit of the Navajo and such other Indians as may already be located thereon"?

Next, we must determine whether the 1974 jurisdictional act confers jurisdiction of the Hopi Tribe's claim for accounting.

A. What Rights Are Conferred by the 1934 Act?

1. What lands are included in the phrase, "all vacant unreserved, and unappropriated . . . lands . . . including all temporary withdrawals?" Does the 1934 Act apply to all prior executive order withdrawals or only some of them?

The Navajos contend first that "including" means that "temporary withdrawals" are a subclass (or example) of "vacant, unreserved, and unappropriated" lands. The district court held that "including" meant "and". In the district court's view the 1934 Act withdrew: (1) vacant . . . lands, *and* (b) temporary withdrawals.

We agree with the district court. The primary purpose of the 1934 Act was to consolidate land ownership within the boundaries of the Reservation. Prior to 1934 neither tribe had recognized (compensable) title to areas withdrawn by executive order. To effectuate consolidated land ownership, the 1934 Act should be read to confirm land title to the greatest possible amount of land. The district court's conclusion is consistent with this.

The Navajos' suggestion that title was conferred only to "vacant" lands would have anomalous results. The district court's holding makes Hopi title hinge on possession, occupancy, or use. Hopi possession would preclude a finding of vacancy. The Hopis would have no title. Navajo title would be limited to lands vacant in 1934. We therefore reject this suggestion.

The Hopis contended that "temporary withdrawals" include all executive order withdrawals except the 1882 reservation exempted by the 1934 Act. The district court agreed, equating "temporary withdrawals" with executive order withdrawals. Its conclusion was based on the 1934 Act's purpose to consolidate reservation land ownership.

It was necessary to confirm title in all executive order withdrawals since such withdrawals in themselves confer no recognized or compensable title. *See United States v. So. Pac. Transp. Co.*, 543 F. 2d 676 (9th Cir. 1976).

The Navajos argue that "temporary" has acquired special meaning in United States Attorney General and Interior Department opinions (which were based on dicta in a Supreme Court cases, *United States v. Midwest Oil*, 236 U.S. 459 (1914)). In the Navajos' view, executive order withdrawals made to preserve a *status quo* until Congress can act are "temporary", and executive order withdrawals made for public purposes where no legislative action is contemplated are "permanent".[3]

The district court rejected this suggestion firmly. Its reasoning is persuasive. The overriding purpose of the 1934 Act repudiates the Navajos' interpretation. To consolidate reservation ownership it was necessary to change the status of reservation land title from a "tenancy at will to a permanent compensable interest". The proposed distinctions were developed by agency officials to justify executive withdrawals that would otherwise have conflicted with legislation. There is no reason to think that Congress approved this device or adopted this usage. If Congress had intended such a technical usage it might have said so clearly.

Finally, it is argued that "temporary withdrawals" must be construed not to apply to withdrawals made expressly for Navajos. The Navajos maintain that once lands are reserved for Indians, any subsequent grant purporting to

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[3]This distinction was approved by this court in *United States v. Consolidated Mines & Smelting Co., Ltd.*, 455 F.2d 432, 445 (9th Cir. 1971), but in reference to an executive order withdrawal. That case sheds no light on whether such a usage should be attributed to Congress, which is the question here.

affect those lands must be strictly construed. *Leavenworth, etc., R.R. Co. v. United States*, 92 U.S. 733, 746 (1876); *Mattz v. Arnett*, 412 U.S. 481 (1973); *Seymour v. Superintendent*, 368 U.S. 35 (1962). The cited cases all involved assertions that Congress had withdrawn land from Indian reservation status, hence its status as "Indian country". See 18 U.S.C.§ 1151. Among other things such a result would have terminated federal and tribal jurisdiction, both civil and criminal. 18 U.S.C.§ 1151; *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975). In view of these drastic results, a congressional intention to terminate is not to be inferred unless it is "expressed on the face of the Act or . . . clear from the surrounding circumstances and legislative history." *Mattz v. Arnett, supra*, 412 U.S. at 505.

No intent to terminate need be shown here because there has been no termination. No one contends that the 1934 Act withdrew the Reservation from Indian country. The federal government's jurisdiction and trust obligations remain intact. *See, e.g.*, 25 U.S.C.§ 631 *et seq.* Far from terminating prior executive order reservations, the 1934 Act reinforces them by recognizing and confirming Indian title.

Assuming an executive order could create an exclusive right of occupancy in one tribe versus another, it is important "to have in mind the circumstances in which the reservation was created". *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 87 (1918). *See also United States v. Walker River Irr. Dist.*, 104 F.2d 334, 336 (9th Cir. 1939). Where two tribes have intermingled in the pattern shown here, we cannot blandly assume the executive has divested the indigenous tribe. The Navajos do not convincingly show that such was the executive's intent.

The Navajos next contend that the 1900 executive order withdrawal was ratified by a 1902 appropriations act, thereby recognizing Navajo title. A strict standard applies in determining whether legislation transfers or recognizes compensable title. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 278-79 (1955) ("[T]here must be the definite intention by congressional action or authority to accord legal rights, not merely permissive occupation"); *Hynes v. Grines Packing Co.*, 337 U.S. 86, 105 (1949) ("It would take specific and unambiguous legislation to cause us to rule that Congress intended to authorize the Secretary of the Interior to alienate . . . fisheries permanently").

The 1902 appropriations act makes no direct or indirect mention of title. The Navajos do not point to convincing legislative history to support their position.[4] We reject the Navajo argument. *See Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655-56 (1976).

We conclude that the 1934 Act applies to all prior executive order withdrawals.

2. What property interests are conferred by the phrase "for the benefit of the Navajo and such other Indians as may already be located thereon"?

The Hopis contend that this provision vests undivided, one-half interests in both tribes. In their view, "as may already be located thereon" is merely a way of identifying the Hopis. It does not limit Hopi rights to land occupied. In real estate conveyancing parlance, they are "words of purchase".

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[4]The Navajo position is based on evidence that President McKinley felt that it would be unjust to take the 1900 executive order lands without compensation. This says little of legislative intent to recognize exclusive Navajo title.

The district court held that this language limits Hopi rights to lands "possessed, occupied or used" in 1934. The words " as may already be located thereon" are words of limitation. Under the district court's holding, the Navajos have: (1) an undivided one-half interest in lands occupied by the Hopis in 1934, and (2) exclusive trust title in all other reservation lands.

The 1934 Act is concerned primarily with Navajo affairs. The boundaries described are of "the Navajo Indian Reservation". The Act provides for the purchase of additional Navajo lands with Navajo funds. Navajos are precluded from receiving royalties from water developments on lands added to the Navajo reservation. Further allotments to Navajos are restricted. The Secretary is authorized to acquire private land for the Navajos. The State of Arizona is authorized to exchange school sections "within the boundary of the Navajo Reservation . . . in favor of said Indians". Funds are authorized to purchase the State's improvements on school sections if the State assigns its interest in the sections to the Navajos.

The only mention of the Hopis in the 1934 Act is in the provision excepting the 1882 reservation from the Act's effects. The Hopis' argument that the "plain meaning" of the 1934 Act vests equal title in both tribes is tenuous at best. They stress the word "all" in "All . . . lands . . . are . . . withdrawn . . . for the benefit of the Navajo and such other Indians as may already be located thereon". However, one must resort to extrinsic sources even to conclude that "such other Indians" includes the Hopis. The word "all" could be read to create undivided one-half interests in both tribes, but it does not do so unambiguously. Legislative history makes it plain that "located thereon" cannot be read to convey to the Hopis

a one-half interest in the Reservation. The district court's holding was based on a fair reading of the 1934 Act's legislative history. *See* 448 F. Supp. 1193-1196.

The Hopis suggest that real property conveyancing presumptions require that this language be construed to create a tenancy in common. Policies underlying conveyancing presumptions have no necessary application to federal-Indian relations.[5] The intent of Congress, which we read to conflict with the conveyancing presumptions, governs. We therefore reject this suggestion.

The Hopis also suggest this result is inconsistent with *Healing v. Jones, supra*, 210 F. Supp. 125. In *Healing* a 1958 statute withdrew the lands described in the 1882 executive order. The 1958 statute withdrew lands "for the Hopi Indians and such other Indians, if any, as heretofore have been settled thereon by the Secretary of the Interior pursuant to such Executive order". The 1882 executive order used similar words: "for the use and occupancy of the Moqui (Hopi), and such other Indians as the Secretary of the Interior may see fit to settle thereon." The *Healing* court held that the 1882 order created a Hopi right of occupancy to the entire area,

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[5]In *United States v. Washington*, 520 F.2d 676, 685 (9th Cir.), *cert. denied*, 423 U.S. 1086 (1976), *aff'g*, 384 F. Supp. 312 (W.D. Wash. 1974), this court drew by analogy on cotenancy principles to adjust competing Indian and non-Indian claims to fisheries. However, this was only after the rights to the fisheries were determined pursuant to principles of treaty interpretation. The cotenancy analogy was used in aid of partition, after title was determined.

If we were to apply real property principles to this case, the more accurate analogy might be to a class gift. *See Restatement of Property*, § 300 (and *see* Comment f), and § 367, Comment e (1940 ed.).

regardless of where they settled. The Navajos subsequently acquired an equal right to occupy lands on which they were administratively settled. In areas where there was no Navajo settlement, the 1958 Act confirmed exclusive Hopi trust title.

The Hopis contend that the district court's ruling here is in effect the same as the ruling in *Healing*: the named tribe receives an interest in all lands, while the "other Indians" have a one-half interest in land occupied. Yet the statute and order in *Healing* are different from the 1934 Act at issue here. In *Healing* "other Indians'" rights were contingent on administrative action. In this case no such action was required. The 1934 Act immediately vested rights in both tribes. Therefore, the Hopis argue, equivalent results in the two cases must be error.

Even if the district court's holding were inconsistent with *Healing*, legislative intent behind the 1934 Act must control. But there is no inconsistency. The statute and order in *Healing* used different language in a different legislative setting than the 1934 Act. The fact that the two cases arrived at superficially similar results should not in itself give pause. The single factor present in *Healing* and not here was the initial withdrawal of all land in favor of the named tribe. In *Healing* the "other Indians" obtained an interest in reservations lands only after obtaining secretarial authorization to settle. The Hopis seem to suggest that this *Healing* method is the only way for Congress to authorize the result the district court reached. Congressional power over Indian land is broad. *Warren Trading Post v. State Tax Commission*, 380 U.S. 685 (1965); *United States v. Sandoval*, 231 U.S. 28 (1913). We cannot restrict Congress in the way the Hopis suggest. Congressional intent is inconsistent with the Hopis' claim to entitlement to a one-half interest in the reservation. We must respect that intent.

Finally, the Hopis argue that the issue of title is a political question. Congress did not identify Navajo-Hopi boundaries in the 1934 Act. The Hopis would not agree to boundaries proposed by the administration, and Congress was unwilling to force the issue. The Hopis lobbied to protect what they thought was theirs. This resulted in the exemption of the 1882 reservation from the 1934 Act and the "such other Indians" language. The question is what inferences can be drawn from this. The Hopis suggest that: (1) since Congress refused to draw a Navajo-Hopi boundary, it is improper (as a political judgment) for the court to impose limitations on Hopi property interests; and therefore (2) the 1934 Act must be read as creating a cotenancy. The Navajos suggest that Congress specifically limited Hopi rights by the "such other Indians as may already be located thereon" provision.

Whether the title question is political depends on whether there is "a lack of judically discoverable and manageable standards for resolving it"; or whether the question is impossible to decide "without an initial policy determination of a kind clearly for non judicial discretion". *Baker v. Carr*, 369 U.S. 186, 217 (1962). *See also Healing v. Jones, supra*, 174 F. Supp. at 216 ("[I]f the identification of the holders of such title and extent and nature of the respective rights and interests of each cannot be fixed without exercising, or reviewing the exercise of, political judgment, then the judicial power is not constitutionally invoked.").

If we agreed that there were insufficient standards to determine title, it does not follow, as the Hopis maintain, that we must declare the tribes cotenants. It would be more logical for us to dismiss the case for lack of jurisdiction of the political question.

We do not agree, however, that there are no judicially ascertainable standards governing this question. We acknowledge the absence of a Navajo-Hopi boundary, as we must. We do not concede that the question of Navajo and Hopi property interests was left open. It is a mistake to assume that the absence of a boundary negates standards for determining title. The purposes, history, and language of the 1934 Act show an intent to withdraw all reservation land for the Navajos except for pockets occupied by Hopis. We agree with the district court that this is the meaning of the "such other Indians as may already be located thereon" provision. The legislative history discussed by the district court at 448 F. Supp. 1194-96, supports this conclusion.

Congress was not inflexibly committed to the notion of exclusive areas for the two tribes. It preferred to allow the tribes to work out whatever cooperative arrangement they could. But when negotiations failed, the 1974 jurisdictional act authorized the courts to declare boundaries if one of the tribes so requested. Since its jurisdiction was invoked for this purpose, the district court properly looked to the legislative history of the 1934 Act to determine the tribes' interests.

To be sure, Congress did not specify in metes and bounds the extent of tribal property interests in the withdrawn property. Nevertheless, legislative intent is clear enough to enable us to identify Hopi interests by areas settled. Navajo interests are identifiable as the residue. Congress recognized Hopi concern over the 1882 reservation and their villages, shrines, and grazing areas outside the 1882 reservation. The "such other Indians" provision was explained to the Hopis as protecting their rights to areas occupied outside the 1882

reservation. There is no indication that anyone contemplated joint title to the entire area involved here. In this context the Hopis' assertion of joint title must be rejected.

The district court held that the Hopis' interest in land they were occupying in 1934 was limited to an undivided one-half interest. In effect the district court held that because the 1934 Act did not establish boundaries for exclusive Hopi lands, each tribe must have an undivided one-half interest. We have rejected this approach in determining the question of title. We must draw on legislative history to find standards for determining title.

Looking to legislative history, a stronger case can be made that Hopi interests are exclusive rather than joint. The Act was not intended to disturb then-existing land tenure patterns. Hopi villagers were told the Act would "protect the rights of the Hopi Indians to the lands they occupy around here and there is absolutely no chance of the Hopis' rights to these lands being disturbed." Ex. H. 143, at 766. It is true that the phrase "the Hopis' rights to these lands" is ambiguous. Technically speaking, neither the Hopis nor the Navajos could have had any clear idea what those rights might be. But in their natural and untechnical sense these words are not ambiguous. They say rather clearly that the 1934 Act would not disturb the Hopis' right to occupy the land they were then occupying. This is consistent with the intent of the 1934 Act to preserve a *status quo* and not to disturb existing arrangements. We therefore reverse the judgment insofar as it limits Hopi interests to an undivided one-half interest in lands they exclusively possessed, occupied, or used in 1934. Judgment should be entered declaring Hopi interests in those lands to be exclusive.

B. Does the Court Have Jurisdiction of the Hopi Claim for an Accounting?

The Hopis claim that jurisdiction of the claim for an accounting is conferred expressly and impliedly by the 1974 jurisdictional act. They contend that express authority is provided by 25 U.S.C.§ 640d-17(c):

> Either tribe may institute such further original, ancillary, or supplementary actions against the other tribe as may be necessary or desirable to insure the quiet and peaceful enjoyment of the reservation lands . . ., and to fully accomplish all objects and purposes of sections 640d to 640d-24 of this title.

They also contend that an accounting is an integral aspect of an action for partition. Therefore 25 U.S.C.§ 640d-7(b), authorizing partition of jointly held lands, impliedly authorizes an accounting.

The district court rejected these contentions. *See* 448 F. Supp. 1183. Its conclusion was correct. Federal courts' jurisdiction being limited, the burden was on the Hopis to establish jurisdiction. The United States and Indian tribes such as the Navajos possess coextensive sovereign immunity. Tribes may be sued only with the consent of Congress. *Hamilton v. Nakai*, 453 F.2d 152, 158 (9th Cir. 1972). When Congress consents to suit, it may impose limitations. Limitations must be "strictly observed and exceptions thereto are not to be implied". *Id.* at 159 (quoting from *Soriano v. United States*, 352 U.S. 270, 276 (1957). Therefore the Hopis have a heavy burden to establish jurisdiction.[6]

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[6]The Hopis' characterization of the 1974 jurisdictional act as "remedial legislation" is unconvincing. The 1974 Act was intended to settle a title controversy between two quasi-sovereign Indian tribes. The Act does not create a private remedy for wrongs. Compare *Tcherepnin v. Knight*, 389 U.S. 332 (1967) (private remedy under securities acts).

Section 17(c) does not mention claims for accounting. There is therefore no express grant of jurisdiction of accounting claims in section 17(c).

Nor do we see a sound basis for an implied jurisdictional grant. The 1974 jurisdictional act provides different procedures and remedies for the 1882 executive order reservation and for the surrounding reservation confirmed by the 1934 Act. The 1974 Act specifically provides for accountings and damages claims for lands within the 1882 reservation. 25 U.S.C. 640d-17(a). The absence of similar provisions for the 1934 Act's lands is telling.[7] The district court gave a likely explanation for the omisssion. Without a prior adjudication of title, Congress could not know what kind of financial burden an accounting would impose and on which tribe. If the Hopis were entitled to one-half of the Navajo reservation, for instance, an accounting might break the Navajo bank. It is therefore likely that Congress purposefully did not authorize an accounting claim. We cannot infer one.

The Hopis contend that the legislative history of the 1974 jurisdictional act shows that an accounting was intended. We disagree. The legislative history shows only

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[7]The Hopis offer an obscure explanation for this omission. They contend that an accounting and damages are authorized for the 1882 reservation lands because title to those lands had already been adjudicated (in *Healing v. Jones, supra,* 210 F. Supp. 125) when Congress passed the 1974 jurisdictional act. It was therefore possible for Congress to spell out the details of the final settlement of the 1882 title claims. In contrast, title to the 1934 Act reservation is still uncertain. Congress could not spell out the "details" of a final settlement because of this uncertainty.

This argument is strained. There is no convincing reason to believe that uncertainty over title caused Congress to provide for an accounting only impliedly. The same uncertainty did not prevent Congress from specifically allowing for partition.

a desire for a final settlement of all title claims. This history might support an inference that an accounting was intended. But any inference is weak at best and cannot sustain the Hopi burden of establishing jurisdiction.

Similarly unconvincing is the Hopi contention that an accounting is merely an inherent aspect of judicial partition. The authorities they cite support such a position, but only with respect to private adjudications. None involve Indian tribes possessing attributes of sovereignty. None involve a federal statute establishing detailed processes and standards for quieting title, partition, and accountings in limited circumstances. We must strictly observe the limitations Congress has established.

The 1974 jurisdictional act, 25 U.S.C.§ 640d-7, authorizes actions to quiet title and to partition lands in some circumstances. Section 640d-17(c) authorizes "further original, ancillary or supplementary actions" only if they insure "the quiet and peaceful enjoyment of the reservation lands" or to accomplish the "objects" of the Act. It is not at all clear that an action for accounting would insure quiet and peaceful enjoyment of reservation lands. The effect might be the opposite. The "objects" of the 1974 jurisdictional act with respect to the 1934 Act lands are spelled out in section 640d-7. Those objects are to quiet title and to partition certain lands. An action for accounting serves neither purpose.

III. CONCLUSION

We remand to the district court to determine what land the Hopis "possessed, occupied, or used" in 1934. In doing so, we acknowledge the possibility that some reservation land, grazing land for instance, may have been used by both tribes in 1934. Even in villages it may not

be possible for the court to conclude that the Hopis "possessed, occupied, or used" such land exclusively. In that event it may be proper on remand for the district court to declare title to be joint or undivided, subject to partition. We reverse only with respect to the district court's holding that Hopi title is necessarily non-exclusive, even with respect to land that was actually and exclusively "possessed, occupied, or used" in 1934.

AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED.

APPENDIX C

ACT OF JUNE 14, 1934, 48 STAT. 960

1934. Exterior boundaries of Navajo Reservation in Arizona

ch. 521, 48 Stat. 960-962

AN ACT

To define the exterior boundaries of the Navajo Indian Reservation in Arizona, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the exterior boundaries of the Navajo Indian Reservation, in Arizona, be, and they are hereby, defined as follows: [land description] . . . . All vacant, unreserved, and unappropriated public lands, including all temporary withdrawals of public lands in Arizona heretofore made for Indian purposes by Executive order or otherwise within the boundaries defined by this Act, are hereby permanently withdrawn from all forms of entry or disposal for the benefit of the Navajo and such other Indians as may already be located thereon; however, nothing herein contained shall affect the existing status of the Moqui (Hopi) Indian Reservation created by Executive order of December 16, 1882. There are hereby excluded from the reservation as above defined all lands heretofore designated by the Secretary of the Interior pursuant to section 28 of the Arizona Enabling Act of June 20, 1910 (36 Stat. L. 575), as being valuable for water-power purposes and all lands withdrawn or classified as power-site lands, saving to the Indians, nevertheless, the exclusive right to occupy and use such designated and classified lands until they shall be required

for power purposes or other uses under the authority of the United States: *Provided,* That nothing in this Act contained shall be construed as authorizing the payment of proceeds or royalties to the Navajo Indians from water power developed within the areas added to the Navajo Reservation pursuant to section 1 of this Act; and the Federal Water Power Act of June 10, 1920 (41 Stat. L. 1063 [16 U.S.C. § 791a et seq.]), and amendments thereto, shall operate for the benefit of the state of Arizona as if such lands were vacant, unreserved, and unappropriated public lands. All valid rights and claims initiated under the public land laws prior to approval hereof involving any lands within the areas so defined, shall not be affected by this Act.

* * *

APPENDIX D

ACT OF DECEMBER 22, 1974, 88 STAT. 1712, AS CODIFIED IN 25 U.S.C. § 640d-7

§ 640d-7. Determination of tribal rights and interests in land—Authorization to commence and defend actions in District Court

(a) Either tribe, acting through the chairman of its tribal council for and on behalf of the tribe, is each hereby authorized to commence or defend in the District Court an action against the other tribe and any other tribe of Indians claiming any interest in or to the area described in the Act of June 14, 1934, except the reservation established by the Executive Order of December 16, 1882, for the purpose of determining the rights and interests of the tribes in and to such lands and quieting title thereto in the tribes.

Allocation of land to respective reservations upon determination of interests

(b) Lands, if any, in which the Navajo Tribe or Navajo individuals are determined by the District Court to have the exclusive interest shall continue to be a part of the Navajo Reservation. Lands, if any, in which the Hopi Tribe, including any Hopi village or clan thereof, or Hopi individuals are determined by the District Court to have the exclusive interest shall thereafter be a reservation for the Hopi Tribe. Any lands in which the Navajo and Hopi Tribes or Navajo or Hopi individuals are determined to have a joint or undivided interest shall be partitioned by the District Court on the basis of fairness and equity and the area so partitioned shall be retained in the

Navajo Reservation or added to the Hopi Reservation, respectively.

Authorization for exchange of reservation lands

(c) The Navajo and Hopi Tribes are hereby authorized to exchange lands which are part of their respective reservations.

Denial of Congressional interest in merits of conflicting claims; liability of United States

(d) Nothing in this section shall be deemed to be a Congressional determination of the merits of the conflicting claims to the lands that are subject to adjudication pursuant to this section, or to affect the liability of the United States, if any, under litigation now pending before the Indian Claims Commission.

Payment of legal fees, court costs and other expenses

(e) The Secretary of the Interior is authorized to pay any or all appropriate legal fees, court costs, and other related expenses arising out of, or in connection with, the commencing of, or defending against, any action brought by the Navajo or Hopi Tribe under this section.

APPENDIX E

Executive Order of January 8, 1900

It is hereby ordered that the tract of country lying west of the Navajo and Moqui reservations in the Territory of Arizona, embraced within the following-described boundaries, viz: beginning at the southeast corner of the Moqui reservation and running due west to the Little Colorado River; thence down that stream to the Grand Canyon Forest Reserve; thence north on the line of that reserve to the northeast corner thereof; thence west to the Colorado River; thence up that stream to the Navajo Indian reservation, be, and the same is hereby, withdrawn from sale and settlement until further ordered.

WILLIAM MCKINLEY

Executive Mansion
January 8, 1900

APPENDIX F

56TH CONGRESS, *1st Session.* SENATE. DOCUMENT No. 68.

ENLARGEMENT OF NAVAJO INDIAN RESERVATION, IN ARIZONA.

MESSAGE

FROM THE

PRESIDENT OF THE UNITED STATES,

TRANSMITTING

A COMMUNICATION FROM THE SECRETARY OF THE INTERIOR, WITH ACCOMPANYING PAPERS, EXPRESSING AN URGENT NECESSITY FOR THE ENLARGEMENT OF THE NAVAJO INDIAN RESERVATION, IN ARIZONA.

January 10, 1900.—Read, referred to the Committee on Indian Affairs, and ordered to be printed.

To the Senate and House of Representatives:

I transmit herewith a communication from the Secretary of the Interior, dated the 5th instant, with accompanying papers, expressing an urgent necessity for the enlargement of the Navajo Indian Reservation, in Arizona, to enable these Indians to support themselves by stock raising within the limits of their reservation.

WILLIAM MCKINLEY.

EXECUTIVE MANSION,
Washington, January 10, 1900.

DEPARTMENT OF THE INTERIOR,
Washington, January 5, 1900.

The PRESIDENT:

For several years past it has been manifest to the Department that the Navajo Reservation is inadequate to supply water and grass for the herds of the Indians, and many of them, perhaps one-third of the tribe, for that reason have been habitually off the reservation on the public domain, where they are in frequent conflict with whites over the grazing of their herds.

Various officials of the Department, within the past year or two, have recommended an enlargement of the reservation by extending it westerly within certain defined boundaries. But the physical characteristics of the proposed extended area were, until recently, unknown to the Department, and no action looking to an addition to the reservation was taken until March 14, 1899, when Indian Inspector James McLaughlin was directed to proceed to the reservation and go carefully over the ground and report all information necessary to enable the Department to act intelligently upon the question of enlargement, with such recommendations as in his judgment might best promote the welfare of the Indians, with due regard to the rights and interests of the white settlers of that section.

In his report, dated June 13, 1899, the inspector recommends an extension of the reservation by metes and bounds which he deems essential for the grazing of the Indians' herds without encroaching upon the territory of and coming in contact with the whites, and states that there is no question in his mind that the present reservations of the Navajo and Moqui Indians (the latter being

a small reservation adjoining that of the Navajos on the south and west, a part of which it seems is also used by the Navajos), is insufficient for their herds, and consequently a large number of them are frequently off the reservation, ranging their herds as far south as the Santa Fe Railroad, in Coconino and Navajo counties, which is the cause of contention with the whites, whose herds are taxed by the respective counties in which they are ranged and their owners reside, while those of the Indians eat off the grass and exhaust the water supply and go untaxed.

The citizens of Coconino County, as evidenced by a petition presented to Inspector McLaughlin, "are a unit as to the advisability and necessity of making the Little Colorado the western boundary (the boundary of the proposed extension) of the Indian reservation and keeping the Indians on their reservation," and Governor Murphy, of Arizona, commends the extension to the limits above described, "as being better for all concerned and less liable to cause friction between the Indians and the whites."

From the best information obtainable the inspector reports that there are usually from 750 to 800 Indians ranging herds west (off) of the reservation, but that sometimes there are from 1,000 to 1,200, and that it is probable that the actual number will approximate 1,000.

A list or schedule of white settlers on the proposed addition to the reservation, and of their improvements, is submitted by Inspector McLaughlin, from which it appears that there are twenty families whose claims and improvements, at a reasonable estimate, he considers to be worth $45,000. Two other claims are also reported, at a valuation of $1,500 each, making an

aggregate of $48,000 as probably necessary to purchase the improvements and rights of the parties in question.

An agreement in writing was made with the settlers whereby they agree to accept the sums stipulated for their respective improvements and to vacate their locations upon payment by the Government. This agreement expires on July 1, 1900, if the property be not purchased by the Government before that date.

Considering the importance to the whites of that locality and to the Indians, for whose herds there seems clearly to be insufficient grazing on the present reservation, together with portions of that set apart for the Moquis, which they also use for the purpose, I have the honor to recommend that the matter be brought to the attention of Congress, with your favorable recommendation for the enlargement of the reservation as stated, and for an appropriation of $48,000 to pay the claims of the settlers referred to.

I also recommend that the inclosed Executive order be made and returned to the Department, reserving from entry and settlement the lands described in the inspector's report, so that further possible locations thereon may be prevented and consequent complications with other settlers avoided pending Congressional action.

Duplicate copies of the correspondence in the case and duplicate drafts of the proposed legislation, which meets with my approval, and of maps showing the present reservation and the proposed addition thereto, are inclosed for submission to the two Houses of Congress.

Very respectfully,

E. A. HITCHCOCK, *Secretary.*

DEPARTMENT OF THE INTERIOR,
Washington, March 14, 1899.

SIR: For several years it has been represented to the Department that the water and grass on the Navajo Reservation are insufficient to supply the herds of the Indians, and that for that reason perhaps one-third of the tribe are habitually off the reservation on the public domain, where they are in frequent contentions with the whites over water and grass.

Within the past year or two it has been recommended by yourself and other officials of the Department that the reservation be enlarged by extending the line due west from the west boundary line of the Moqui Reservation to the southeast corner of the Grand Canyon Forest Reserve to the Colorado River; thence up that stream to the Indian Reservation. But the Department has had no detailed report as to the number of white settlers or the number of Indians in this territory, nor as to the amount of water and grass, nor as to its desirability as an Indian reservation, nor as to what difficulties might be encountered by the Department if it proposed to add this territory to the reservation.

When you reach that reservation under your orders of January 27, 1899, in reference to the Moen Copie Wash allotments, I desire you to go over the ground carefully and report to the Department all necessary information to enable it to act intelligently in the matter, with such recommendations as in your judgment might best promote the welfare of the Indians, with due regard to the rights and interests of the white settlers of that section.

If upon a more careful examination of the country you should find that the addition of any other section

would be more desirable than this, or that the lines should be different from those heretofore recommended, you will report that fact, together with your reasons therefor.

Very respectfully,

THOS. RYAN,
Acting Secretary.

JAMES MCLAUGHLIN,
United States Indian Inspector, St. Paul, Minn.

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* * *

FLAGSTAFF, ARIZ., *June 13, 1899.*

SIR: As directed by Department letter of March 14, 1899, I have the honor to submit the following report with reference to increasing the Navajo Indian Reservation:

I arrived at Flagstaff on the 8th ultimo, en route to Tuba City to carry out Indian Office instructions of January 25 last, relative to certain land matters and water privileges at Moencopie, and having in view the report called for regarding extension of Navajo Reservation, and having from my visit to this section last summer learned something of the opposition of the settlers of Coconino County to a southern extension of the reservation, as set forth in a report that I had the honor to submit under date of August 15 last, I concluded to remain over in Flagstaff one day, that I might ascertain the sentiment now prevailing as to the extension of the Navajo Reservation by extending a line due west from the west boundary line of the Moqui Reservation to the southeast corner of the Grand Canyon Reserve, thence north on the eastern boundary of the said forest reserve to its northeast corner, thence west along said boundary to the Colorado River, thence up that stream to the Indian reservation.

* * *

There is no question but that the present reservation of the Navajo and Moqui Indians is insufficient for the Navajo herds (the Moqui Reservation, all except what is cultivated by the Moquis, being appropriated by the Navajoes for grazing their flocks), in consequence of which a large number of the Navajoes are frequently off their reservation on the public domain, ranging their herds as far south as the Sante Fe Railroad, in portions

of Coconino and Navajo counties, which occasion contentions over ranges, as the untaxed herds of the Indians eat off the grass and exhaust the water supply, to the detriment of the white stockmen, whose herds are taxed by the respective counties in which they reside.

The Navajo Indians are entitled to commendation for their progressiveness in the sheep industry, and as they can not maintain sufficient herds upon the sandy and impoverished ranges within their present boundaries to support themselves, I would strongly recommend enlarging their reservation, so that they would not be obliged to range their untaxed herds in organized counties on the public domain, and by which they could be more reasonably required to remain within their reservation boundaries, which would be much better for the Indians and assure more friendly relations between them and the neighboring whites than is possible under present conditions.

* * *

I visited all of said settlers and traders, who are all squatters upon unsurveyed Government lands, but surveys were being made embracing their claims while I was in the neighborhood. I examined their improvements very carefully, anticipating an extension of the lines of Navajo Reservation, and in order that the same might be facilitated I obtained from the said 20 Mormons a written agreement, wherein they each agree to accept a certain sum for their respective improvements and to vacate their locations upon payment to them by the Government of the stipulated amounts, aggregating $45,000. ....

* * *

Referring to the country west of the reservation, I desire to state that I made particular inquiry of all persons whom I met who were familiar with the territory embraced in the contemplated extension of reservation as to the amount of water and grass it contained and its desirability as a range for the Indian herds, and I was informed by S. S. Preston, Indian trader at Willowsprings; James Black and E. M. Tackett, prospectors; Ashton Nebeker and Joseph Tanner, of Tuba City, and others, all of whom are familiar with the character of the country and its resources, that grass is very scarce throughout the territory referred to, except in the western portion, where water is scarce, in consequence of which a large tract of good grass land can not be utilized for summer grazing, but affords good winter range when snow is on the ground, and all of them believed that from the nature of the soil water could be secured for use of stock by a system of storage reservoirs at comparatively small expense.

* * *

Regarding the lines upon which the Navajo Indian Reservation should be extended, I have the honor to state that while the line recommended by Acting Agent Constant Williams, under date of May 7, 1898, would be desirable and in the interests of the Indians, I at the same time know that it would be very objectionable to the citizens of Coconino County, and having discussed the matter with the leading citizens of said county and obtained their consent to accept the Little Colorado River as the southern boundary line of the proposed extension (see Exhibit No. 22, transmitted herewith), I would respectfully recommend an extension of the reservation on a line due west from the southwest corner of the Moqui Reservation to the Little Colorado River,

thence down the Little Colorado to the eastern boundary line of the Grand Canyon Forest Reserve, thence north on the boundary of the said forest reserve to its northeast corner, then west along the north boundary of said forest reserve to the Colorado River, thence up the Colorado River to the Navajo Indian Reservation.

This would add to the Navajo Reservation a tract of country of about 40 by 50 miles, 1,280,000 acres, making the Little Colorado River the southern boundary, which river is considerable of a stream and would give a natural and well-defined boundary, which could be easily recognized by the whites; and, as I am informed, the Little Colorado River was formerly the dividing line between the Navajoes and Apaches, and which was thus strictly adhered to and respected by both tribes, the Navajos could therefore be brought to recognize and accept said stream along the extended portion of the reservation as their boundary line, over which they should not graze their herds.

In conclusion I desire to add that I have taken great pains to inform myself regarding the proposed extension of the Navajo Reservation, as herein set forth, which I trust will enable the Department to act understandingly in the premises.

I am, sir, very respectfully, your obedient servant,

JAMES MCLAUGHLIN,
United States Indian Inspector.

THE SECRETARY OF THE INTERIOR,
Washington, D.C.

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* * *

DEPARTMENT OF THE INTERIOR,
Washington, June 24, 1899.

SIR: On the 14th of March last Inspector James McLaughlin was instructed by the Department to proceed to the Navajo Agency and make an examination of the country lying west of the Moqui Reservation, and report to the Department all necessary information to consider the recommendations which had previously been made by himself and Maj. Constant Williams, the then acting Indian agent of the Navajo Agency, to enlarge the Navajo Reservation by extending the lines from a point on the west line of the Moqui Reservation to the southeast corner of the Grand Canyon Forest Reserve; thence north to the northeast corner of said reserve; thence west to the Colorado River; thence up that stream to the Navajo Reservation.

Inspector McLaughlin has lately performed this service, and herewith I hand you his report, dated the 13th instant, and all accompanying papers. After a careful examination of the country, and considering the interests of both the Indian and the white inhabitants thereof, he recommends that the reservation be enlarged by extending the line from the southwest corner of the Moqui Reservation due west to the Little Colorado River; thence down that stream to the Grand Canyon Forest Reserve; thence north on the line of that reserve to the northeast corner thereof; thence west to the Colorado River; thence up that stream to the Navajo Reservation.

The report is respectfully transmitted to you for your consideration. If the recommendations of the inspector meet with your approval you will prepare and submit to the Department, at your earliest convenience, a draft of the proper Executive order to carry the same into effect

as to the enlargement of the reservation, and at the proper time submit a draft of the necessary legislation to authorize and enable the Department to purchase the improvements and claims of the settlers to be included in the reservation.

For your information and consideration in connection with the inspector's report, I inclose a copy of the instructions which were given him for the work, and also a letter from Governor Murphy, of Arizona, dated the 17th instant, in reference to the matter.

Very respectfully,

E. A. HITCHCOCK, *Secretary.*

THE COMMISSIONER OF INDIAN AFFAIRS.

APPENDIX G

ACT OF MAY 27, 1902, 32 STAT. 245, 264-65

* * *

For the purchase of the right, title, and improvements of certain settlers within the external boundries [*sic*] of the Navajo Indian Reservation in Arizona, as set out in the communication of the Secretary of the Interior to the President, dated January fifth, nineteen hundred, and printed in Senate Document Numbered Sixty-eight, of date of January tenth, nineteen hundred, forty-eight thousand dollars, to be used and expended under the direction and within the discretion of the Secretary of the Interior. And the Secretary of the Interior is authorized and empowered to purchase the right, title, and improvements separately of each and every one of the said persons named in the said communication of the Secretary of the Interior, at the price separately agreed upon with the settlers therein named. And when so purchased the improvements and the lands upon which they are situated, in and near Tuba City, are hereby set apart for school or public purposes, as may be hereafter decided upon by the Secretary of the Interior, and until required to be used for such public or school purposes shall be used by the Indians under rules and regulations to be prescribed by the Secretary of the Interior: *Provided,* that the appraisement of Earnest A. Lee's property shall be three thousand seven hundred dollars: *Provided further,* that the Secretary of the Interior shall make no payment for any of said right, title, and improvements unless in his judgment the valuation thereof is fair and just.

* * *

Supreme Court, U. S.
FILED
OCT 10 1980
MICHAEL RODAK, JR., CLERK

No. 80-265

In the Supreme Court of the United States

OCTOBER TERM, 1980

PETER MacDONALD, Chairman of the Navajo Tribal Council of the Navajo Indian Tribe, for and on behalf of the Navajo Indian Tribe and all villages, clans, and individual members of the Navajo Tribe,

Petitioner,

v.

ABBOTT SEKAQUAPTEWA, Chairman of the Hopi Tribal Council of the Hopi Indian Tribe, for and on behalf of the Hopi Indian Tribe and all villages, clans, and individual members of the Hopi Tribe,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH COURT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Petitioner's Questions presented do not properly or accurately frame the questions in the context of this case and the decision of the court below. Respondent submits that if review is to be granted, then the issues raised in the petition should be stated as follows:

1. Whether the court of appeals has properly required proof of definite congressional intention to support the Navajo claim that a portion of the lands in issue was statutorily confirmed as an Indian reservation for the Navajo Tribe by the Act of May 27, 1902, 32 Stat. 245, 264-65.

2. Whether the court of appeals has properly applied the precedent of *Healing v. Jones*, 210 F.Supp. 125 (D. Ariz. 1962), *aff'd per curiam*, 373 U.S. 758 (1963), in determining that the beneficial interest of the "other [Hopi] Indians" referred to in the Act of June 14, 1934, 48 Stat. 960, is an exclusive interest in those lands which were exclusively utilized by the Hopi Indians in 1934, and a joint or undivided interest with the Navajo Tribe in lands which were then utilized by both tribes.

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No. 80-265

In the Supreme Court of the United States

OCTOBER TERM, 1980

PETER MacDONALD, Chairman of the Navajo Tribal Council of the Navajo Indian Tribe, for and on behalf of the Navajo Indian Tribe and all villages, clans, and individual members of the Navajo Tribe,

Petitioner,

v.

ABBOTT SEKAQUAPTEWA, Chairman of the Hopi Tribal Council of the Hopi Indian Tribe, for and on behalf of the Hopi Indian Tribe and all villages, clans, and individual members of the Hopi Tribe,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH COURT

RESPONDENT'S BRIEF IN OPPOSITION

Opinions Below

In addition to the citations of the opinions below contained in the petition, the decision of the Court of

Appeals has been reported as *Sekaquaptewa v. MacDonald*, 619 F.2d 801 (9th Cir. 1980).

Statement of the Case

Respondent Sekaquaptewa has filed with this Court a petition for a writ of certiorari seeking review of the same decision as that for which petitioner MacDonald seeks review herein. *See Sekaquaptewa v. MacDonald*, No. 80-258, filed August 20, 1980. Because the named parties appear in a representative capacity primarily on behalf of the tribes which they represent, the position of petitioner MacDonald will be referred to as the "Navajo" position, and that of respondent Sekaquaptewa will be referred to as the "Hopi" position.

The Navajo Statement of Facts, petition at 4-6, is not a factual statement, but is part of the Navajo argument in support of its first Question Presented, containing conclusions of ultimate facts rejected by the courts below. Specifically, the Navajo Statement of Facts mischaracterizes the status of the lands in issue prior to 1934. *See* petition at 4 n.2. The petition implies that the Navajos had some prior vested rights in the lands withdrawn by the executive orders listed in footnote 2 of the petition. This is simply not true.

Prior to the Act of June 14, 1934, 48 Stat. 960 (the "1934 Act"), a succession of executive orders from 1880 to 1918 had withdrawn lands in which "neither tribe had recognized (compensable) title."[1] The

[1] **Sekaquaptewa v. MacDonald**, 619 F.2d 801, 804 (9th Cir. 1980), petition at 31a.

Navajos argue that title to the lands withdrawn by one of those executives orders (January 8, 1900) was confirmed by a 1902 appropriations act.[2] The fact is that the Executive Order of January 8, 1900, does nothing more than withdraw the described area "from sale and settlement until further ordered" (petition at 54a), and neither the Executive Order of January 8, 1900, nor the 1902 appropriations act makes any mention whatsoever of the granting of title to either the Navajo Indians or Navajo Tribe. As developed more fully below, the status of the 1900 Executive Order lands remained unconfirmed until the 1934 Act changed the status of all those unconfirmed executive order lands from a "tenancy at will to a permanent compensable interest."[3] The purpose of this case is to determine the rights and interests granted to the Hopi and Navajo Tribes by the 1934 Act.

Summary of Argument

On August 20, Respondent Sekaquaptewa filed with this Court a petition for a writ of certiorari which includes petitioner's second question regarding the proper interpretation of the precedent of *Healing v. Jones*, 210 F. Supp. 125 (D. Ariz. 1962), *aff'd per curiam*, 373 U.S. 758 (1963). The issues raised by petitioner MacDonald with respect to this matter can be fully reviewed in the context of respondent Sekaquaptewa's petition.

The first question presented by the petition is frivo-

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[2] **Act of May 27, 1902, 32 Stat. 245, 264-65, petition at 62a.**
[3] **Sekaquaptewa v. MacDonald, 619 F.2d 801, 804 (9th Cir. 1980), petition at 32a.**

lous and not appropriate for further review by the Court. Contrary to the Navajo Statement of the Question, the court below has not changed any existing rule of law by deciding that a "strict standard" must be applied in judging a claim that an Indian reservation has been statutorily confirmed. Neither has it required that the statute alleged to have had that result must "make mention of title." Rather, consistent with many decisions of this Court, the court of appeals has properly required proof of definite congressional intent to support the Navajo claim that the 1902 Indian Appropriation Act statutorily confirmed a permanent, vested title in the Navajo Tribe to the lands first set apart by the 1900 Executive Order. That decision is correct on the facts of this case, which facts demonstrate no such congressional intent. The decision is confined to those facts and does not jeopardize any interest of any other Indian tribe.

ARGUMENT

I

THE QUESTION OF THE PROPER APPLICATION OF *HEALING v. JONES* TO THIS CASE SHOULD BE CONSIDERED IN RESPONDENT SEKAQUAPTEWA'S PETITION FOR CERTIORARI.

A. Review of the Application of *Healing v. Jones* to this Case is Appropriate Only as Presented in Respondent's Petition Seeking Review of the Same Decision.

Respondent Sekaquaptewa's own petition for certiorari raises the question of the proper application to this case of the precedent of *Healing v. Jones*, 210 F.Supp. 125 (D.Ariz. 1962), *aff'd per curiam*, 373 U.S. 758 (1963) (herein "*Healing v. Jones*"). While that question is a significant and important matter to the tens of thousands of Indians residing in the area in dispute, the question should be decided in the context provided by the Hopi petition, *Sekaquaptewa v. MacDonald*, No. 80-258, filed August 20, 1980.

Healing v. Jones was a quiet title action between these same two tribes, appearing through their tribal chairmen. It involved title to executive order Indian reservation lands adjacent to those in issue in this case, and involved the construction of a grant to a named Tribe (the Hopis), with reference to "other Indians" (the Navajos) as additional grantees. Under *Healing v. Jones*, the Navajo Tribe, as the "other Indians" received a one half-interest in nearly two million acres of the "Hopi Reservation." The decision of the special three judge court which decided *Healing* was affirmed on direct appeal to this Court.

In the two petitions for certiorari now before the Court in this case, the Hopi and Navajo Tribes take very different views of how this case should be decided in light of the *Healing v. Jones* decision. Both tribes disagree with the way in which the court of appeals has applied that decision to this case. The court of appeals' view of the case differed in several material aspects from that of the district court.

The District Court held that the 1934 Act granted the Navajos an interest in all the lands in issue but that the Hopis were only entitled to a one-half interest in what they were using, occupying, or possessing on June 14, 1934.

The Court of Appeals reversed in part and held that the Hopi Tribe had an exclusive interest in those portions of the reservation which it was exclusively using, occupying, or possessing on June 14, 1934, and a joint interest with the Navajo Tribe as to those portions which they were jointly using, occupying, or possessing as of that date.

As set forth below, the Navajo petition's version of the matter is not supported by the *Healing v. Jones* decision. Respondent respectfully suggests that review be undertaken in connection with the review requested in respondent's petition No. 80-258, which properly raises the relevant question in the context of this case.

B. *Healing v. Jones* Does Not Support the Result Urged in the Petition.

The Navajo Petition challenging the ruling of the Court of Appeals is based entirely upon an erroneous reading of *Healing v. Jones*. The Navajos incorrectly assert that the decision of the District Court is the only decision which would have been consistent with *Healing v. Jones* because in *Healing v. Jones*, the Hopis received an interest throughout the entire reservation and the Navajo, as the "other Indians," received only a "one-half interest in lands exclusively occupied by

Navajos" and that "the roles of the Navajo and Hopi Tribes" are the reverse in this case. Petition at 15-16.

While noting the similarities in the two situations, the Navajos' argument fails to recognize the differences. The Navajos' petition argues that the acknowledged value of *Healing v. Jones* as a precedent herein requires that an identical outcome follow in both cases, namely that the named tribe has an interest in all the area and that the "other Indians" must prove use and occupancy to obtain an interest. Such an argument, however, ignores the fact that the granting language considered in *Healing v. Jones* contained an express condition subsequent on the interest of the "other [Navajo] Indians" requiring their settlement by the Secretary of the Interior as a condition to obtaining an interest.

The Navajo position ignores the important fact that the *Healing* Court held that the Hopis gained the right to use and occupy the entire reservation "immediately upon the issuance of the executive order."[4] Under *Healing*, the Hopi interest arose "by the self-operating effect" [5] of the 1882 Executive Order with "no further proceedings by way of Secretarial settlement or otherwise being required" [6] This right of use and occupancy was nonexclusive in that it was subject to diminution by Secretarial settlement of "other Indians." The *Healing* Court further ruled that the Navajos, on the other hand, did *not* gain an *immediate* interest and were therefore

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[4] **Healing v. Jones**, 210 F.Supp. at 138.
[5] **Id. at 175.**
[6] **Id. at 138.**

required to prove Secretarial settlement.[7] The ultimate holding of *Healing v. Jones* was that the Hopi and Navajo Tribes had a "joint, undivided, and equal interest" [8] in those areas in which the Navajo were subsequently settled.

In contrast to the factual situation present in *Healing v. Jones*, the granting language of the 1934 Act does not contain any condition subsequent as to the interest of the "other [Hopi] Indians." The rights of *both* the Navajo and the "other [Hopi] Indians" arose *simultaneously* and in the same way as the Hopi rights arose under the 1882 Executive Order, that is by the self-operating effect of the grant. Thus, the 1934 Act granted the Hopis an immediate vested interest with the Navajos throughout all the lands now in issue. Such right was not subject to diminution.

Healing v. Jones thus does not support a finding of identical results, as the Navajo's petition claims, where the granting language is as found in the 1934 Act. Rather, it supports the Hopi theory of the proper application of that decision as asserted in the Hopi petition, No. 80-258.

The claims made in support of the second Navajo question are contrary to the language of *Healing v. Jones*. The question of the proper application of the precedent of *Healing v. Jones* to the granting language of the 1934 Act should be considered in the context presented by the Hopi petition.

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[7] **See, Healing v. Jones, 210 F.Supp. at 143.**
[8] **Healing v. Jones, 210 F.Supp. at 189.**

II

PETITIONER'S ARGUMENTS REGARDING PURPORTED STATUTORY CONFIRMATION OF THE 1900 EXECUTIVE ORDER AREA BY THE ACT OF MAY 27, 1902, ARE INSUBSTANTIAL AND ARE OF NO GENERAL INTEREST.

Respondent Sekaquaptewa submits that the Navajo arguments regarding the purported statutory confirmation of an area of the lands in issue by the Act of May 27, 1902, 32 Stat. 245 (the "1902 Act"), are both insubstantial and of no general interest. Certiorari need not be granted to review and interpret that 1902 Act.

A. The Navajo Petition Misstates the Relevant Issue.

The Navajo petition confuses two separate and distinct concepts and attempts to apply the standard of one to the other. The first concept, and the issue presented to the court of appeals, was whether a compensable, vested interest in the lands withdrawn by the Executive Order of January 8, 1900 had been conveyed to the Navajo Tribe by the 1902 Indian Department Appropriation Act of May 27, 1902, 32 Stat. 245, 264-65, referred to in the Navajo petition and herein as the "1902 Act." The important distinction between an unconfirmed executive order reservation and a confirmed statutory reservation is that the Indians involved have no "recognized (compensable) title" [9] or interest in an

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[9] **Sekaquaptewa v. MacDonald, 619 F.2d at 804, petition at 31a-32a.**

executive order reservation, while they have a vested, compensable interest in a statutorily confirmed Indian reservation.

The second distinct concept concerns the creation of an Indian reservation. The Navajo Petition attempts to apply the test for creation of an Indian reservation to the issue of whether "recognized (compensable) title" has been granted to a tribe, and faults the court of appeals for not doing the same. Indian reservations may be created in a number of different ways, such as by treaty, by statute, or by executive order. The area involved is properly called an "Indian reservation" whether or not the Indians receive "recognized (compensable) title" by the action creating the reservation. The case of *Minnesota v. Hitchcock*, 185 U.S. 373 (1902), cited in the Navajo petition at 9, involved the question of whether a reservation had been created. It does not involve the question presented in this case as to whether "recognized (compensable) title" had been granted to a tribe. Likewise the case of *Sac & Fox Tribe v Licklider*, 576 F.2d 145 (8th Cir. 1978), cited in footnote 6 of the Navajo petition, dealt with the issue of whether fee lands purchased by the Indians had become an Indian reservation because of various federal actions, not whether Congress had conveyed "recognized (compensable) title" to the Indians.

The court of appeals did not hold "that a 'strict standard' must be applied to statutes purporting to establish Indian reservations" as asserted in the Navajo petition at 7. That was not the issue presented to it. The question was whether Congress had divested the

United States of its ownership of the beneficial interest in the 1900 Executive Order lands and had vested that compensable interest in the Navajo Tribe by means of the 1902 Act, which makes no mention of either the Navajo Tribe or of such an intent. In determining this issue, the court of appeals applied the standards set forth below, which are based upon and are entirely consistent with the decisions of this Court.

B. The Language of the 1902 Act Does Not Support the Navajo Argument.

The deficiency of the Navajo argument is best illustrated by the plain language of the 1902 Act and the executive order in question. By Executive Order dated January 8, 1900, the area alleged to have been statutorily confirmed by the 1902 Act was set aside by these words:

> It is hereby ordered that the tract of country [description omitted] be, and the same is hereby, withdrawn from sale and settlement until further ordered.

Ex. H. 29; Ex. N. 32.[10] No mention is made in the order of either the Navajo Tribe or of Indian use.

The statutory language which the Navajo petitioner claims had the effect of confirming that reservation and, therefore, necessarily vesting a permanent, compensable, equitable title in the Navajo Tribe, is found in a 1902 appropriation act. The complete relevant text of that

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[10]The background and legislative and administrative history were presented to the district court by the parties by means of eight bound volumes of historical documents. Documents submitted by the Hopi plaintiff were designated "Ex. H. ....."; those submitted by the Navajo defendant, "Ex. N. ....."

act, a significant part of which is omitted from the text of the Navajo petition, *see* petition at 13, is as follows:

> For the purchase of the right, title, and improvements of certain settlers within the external boundries [sic] of the Navajo Indian Reservation in Arizona, *as set out in* the communication of the Secretary of the Interior to the President, dated January fifth, nineteen hundred and *printed in* Senate Document Numbered Sixty-eight of date of January tenth, nineteen hundred, forty-eight thousand dollars, to be used and expended under the direction and within the discretion of the Secretary of the Interior. And the Secretary of the Interior is authorized and empowered to purchase the right, title, and improvements separately of each and every one of the *said persons named in the said communication* of the Secretary of the Interior, at the price separately agreed upon with the settlers therein named. And when so purchased the improvements *and the lands upon which they are situated, in and near Tuba City, are hereby set apart for school or public purposes, as may be hereafter decided upon by the Secretary of the Interior, and until required to be used for such public or school purposes shall be used by the Indians under rules and regulations to be prescribed by the Secretary of the Interior: Provided,* that the appraisement of Earnest A. Lee's property shall be three thousand seven hundred dollars: *Provided further,* that the Secretary of the Interior shall make no payment for any of said right, title, and improvements unless in his judgment the valuation thereof is fair and just.

32 Stat. 245, 264-65 (May 27, 1902) [Emphasis added]. The statutory language which the text of the Navajo petition conveniently fails to quote provides that

the improvements to be purchased "and the lands upon which they are situated" are specifically set apart "for school or public purposes" as determined by the Secretary of the Interior, with "Indian" usage (not "Navajo" usage) to be permitted temporarily only "until [such lands are] required to be used for such school or public purposes."

Thus, far from confirming in the Navajo Tribe a permanent, vested, and compensable interest in the 1900 Executive Order Reservation lands as claimed in the petition, the 1902 Act merely provided an appropriation of funds to purchase certain pioneer improvements, while specifically stating that "Indian" usage of the lands was to be temporary until the primary "school or public purposes" could be decided upon and implemented by the Secretary of the Interior.

Contrary to the suggestion in the petition, the court below has not stated that the 1902 Act must have made "mention of title" to achieve a statutory confirmation. Rather, that court correctly noted that the 1902 Act itself makes no such mention, a factor relevant to determining the congressional intent. *See Sekaquaptewa v. MacDonald*, 619 F.2d at 805, petition 34a.

C. The Description of the Area as the "Navajo Reservation" Has No Effect on the Indian Title.

The Navajo argument apparently rests on two bases which are clearly insubstantial under the relevant decisions of this Court. The first is the fact that the area

set aside by the 1900 Executive Order is referred to in the 1902 Act as the "Navajo Indian Reservation in Arizona." Thus, the Navajos infer, Congress must have intended to confirm the title in the Navajo Tribe by that reference.

The record reveals that the 1900 Executive Order lands were in fact administered by the Department of the Interior as Indian reservation lands despite the absence of specific Indian-related purpose in the executive order itself. As such, the numerous holdings of this Court regarding the nature of the Indian interest in an Executive Order Indian Reservation are particularly applicable. *See, e.g., Hynes v. Grimes Packing Co.*, 337 U.S. 86, 103 (1949):

> An Indian reservation created by Executive Order of the President conveys no right of use or occupancy to the beneficiaries beyond the pleasure of Congress or the President. Such rights may be terminated by the unilateral action of the United States without legal liability for compensation in any form even though Congress has permitted suit on the claim.

See also Healing v. Jones, 210 F.Supp. 125, 138 (D. Ariz. 1962), *aff'd per curiam*, 373 U.S. 758 (1963); *Sioux Tribe of Indians v. United States*, 316 U.S. 317, 331 (1942) ("the interest which the Indians received was subject to termination at the will of either the executive or Congress and without obligation to the United States.").

Indeed, the language of the 1902 Act, as fully quoted above, confirms that the "Indians" were to have no more interest after the passage of that act than the

temporary use interest that they had before its passage. *See Confederated Bands of Ute Indians v. United States,* 330 U.S. 169, 176 (1949):

> Nor is there any indication in the findings that the President intended to convey more than a transitory, possessory interest by the 1875 Order. That order made the Indians no more than tenants at the will of the Government on that part of the land outside the true treaty reservation.

As noted in the *Hynes* case quoted above, an area set aside by executive order for Indian use is frequently and properly referred to as an "Indian reservation." As this Court has noted in the case of *Minnesota v. Hitchcock,* 185 U.S. 373, 388-89 (1902), decided at nearly the same time as the 1902 Act was passed, the name given to an area speaks nothing of the title status of that area.

> Whether this tract, which was known as the Red Lake Indian reservation, was properly called a reservation, as the defendant contends, or unceded Indian country, as the plaintiff insists, is a matter of little moment. . . .
>
> *The mere calling of the tract a reservation instead of unceded Indian lands did not change the title. It was simply a convenient way of designating the tract.* [Emphasis added.]

Similarly, this Court has held in cases where permanent reservation status was alleged to have been terminated by Congressional action, that the reference to a reservation "in the past tense" or as the "former" reservation in subsequent legislation cannot "be read as in-

dicating any clear purpose to terminate the reservation directly or by innuendo." *Mattz v. Arnett*, 412 U.S. 481, 498 (1973). *See also Seymour v. Superintendent*, 368 U.S 351, 356 n.12 (1962).

Thus, without considerably more in the way of demonstrated Congressional interest, the mere reference to the 1900 Executive Order area as the "Navajo Indian Reservation" carries no significance. It was merely a name for a place.

D. The Reference in the 1902 Act to Senate Document 68 Was Not Sufficient to Confirm a Vested Compensable Interest in the Navajo Tribe.

The second part of the Navajo argument in this regard is the claim that Congress, by referring in the 1902 Act to a particular Senate document, necessarily intended to and did in fact incorporate by reference a suggestion made in one of the letters reproduced in the Senate document, to the effect that it would be desirable if the area in question could be set apart as a reservation. The reference to the Senate document thus supplies, the Navajos argue, not only the intent to achieve the unstated result, but the statutory implementation of that unstated result, and, indeed, does so for the benefit of the Navajo Tribe which is itself not mentioned.

It should be noted as a matter of first order, that the language of the 1902 Act does not state or suggest any intent to incorporate the Senate document by reference. Rather, it refers to that document as an official

source in which can be found both the legal description of the lands affected by the 1900 Executive Order and the names of the settlers whose improvements were to be purchased. *See* the 1902 Act which provides:

> For the purchase of the improvements of certain settlers within the external boundaries [sic] of the Navajo Indian Reservation in Arizona, *as set out in the communication* of the Secretary of the Interior to the President, dated January fifth, nineteen hundred, *and printed in Senate Document Numbered Sixty eight,* of date of January tenth, nineteen hundred . . . . and the Secretary of the Interior is authorized and empowered to purchase the . . . improvements . . . of the *said persons named in the said communication.* [Emphasis added.]

Those were the only references in the 1902 Act to the Senate Document. It is referred to for the simple purpose of identifying an officially published source in which the legal description of the 1900 Executive Order lands and the names of the settlers were "printed." This is hardly an example of a document being "explicitly" or "clearly" incorporated by reference as the Navajo petition asserts. *See* petition at 6, 13 n. 10, 14.

Indeed, an examination of Senate Document No. 68 (Ex. N. 33, S.Doc. No. 68, 56th Cong. 1st Sess. (1900)), reveals that it is a composite document composed of correspondence, schedules of improvements owned by settlers, lists, appraisals, agreements, and even a proposed legislative bill. Under the Navajo theory, all such documents are necessarily now the law of the land by virtue of their being adopted by reference into

the 1902 Act. However, the letters which the Navajos rely upon were the documents which preceded the issuance of the 1900 Executive Order and which provided the justification for its issuance. As the documents indicate, it was intended that "[i]f the Congress shall appropriate the moneys necessary to pay the settlers, the reservation can then be enlarged by Executive order, as recommended by the inspector." Ex. N. 33 at 15. Notwithstanding the fact that it preceded the appropriation referred to, the withdrawal of the area by executive order in 1900 achieved the desired result of providing new, reserved Indian grazing lands without the need for congressional action. None of the items in Senate Document 68 suggest that the Navajos needed to have permanent reservation title to achieve that desired result.

Further examination of Senate Document 68 reveals that a draft bill containing language which could arguably have done what the Navajos now claim did occur was reprinted as part of that Senate document, but that nothing remotely resembling the express and specific language of the bill was included in the 1902 Act in regard to the reservation boundaries. The proposed bill began as follows:

> A BILL establishing the boundaries of an addition to the Navajo Indian Reservation, Arizona, and making appropriation for purchasing the improvements of settlers within the addition.
>
> *Be it enacted* . . ., That the tract of land lying west of the Navajo and Moqui Indian reservations, in Arizona, embraced within the following

> described boundaries, be, and the same is hereby, set aside as an addition to the Navajo Indian Reservation, namely: [Description omitted].

Ex. N. 33 at 19. Section 2 of that bill dealt with the appropriation of money to purchase the improvements of the settlers, and is similar to the language which was incorporated in the 1902 Act.

Such a contrast between the language proposed and the language adopted by Congress has been considered significant in Indian reservation status cases as indicating a congressional rejection of the result which the proposed but unenacted language might have produced. *See Mattz v. Arnett*, 412 U.S. 481, 497-506 (1973). Thus, prior to 1902, Congress had language suggested to it which could arguably have achieved the result urged by the Navajos, but Congress simply chose not to enact it.

It is also significant to note that, as revealed by the record, the Department of the Interior and Congress never subsequently viewed the 1900 Executive Order area as having been confirmed by the 1902 Act, particularly when they undertook consideration of what became the 1934 Act. As noted by the district court in rejecting this Navajo argument:

> The Hopi village of Moencopi is within the 1900 executive order reservation. One stumbling block to passage of the 1934 Act was the presence of this Hopi village. The Navajo tribe would read the status of the Moencopi village completely out of the 1934 Act.

448 F.Supp. at 1192, petition 16a. The district court

apparently believed that acceptance of the Navajo argument on this point would remove the 1900 Executive Order area, including the Hopi village of Moencopi, from the effect of the 1934 Act, making it an exclusively Navajo-owned area by the force of the 1902 Act. Such a result was determined by both courts below to be inconsistent with the statutory language and legislative motives behind both the 1902 and 1934 Acts, and the Navajo arguments were properly rejected.

E. The Court of Appeals has Properly Required Proof of Clear Congressional Intent.

Given these facts, application of the appropriate decisional standard demonstrates that this point of the Navajo petition is neither of general interest nor worthy of further judicial consideration.

The test for determining this question has been set forth by this Court in a number of cases. In *Sioux Tribe of Indians v. United States*, 316 U.S. 317 (1942), the Sioux Tribe claimed that the General Allotment Act of 1887, 25 U.S.C. §331 *et. seq.*, had statutorily confirmed their executive order reservations and created "recognized title" in the Indians because the Allotment Act had statutorily refered to executive order reservations. This Court rejected that idea by adopting the following statement of a congressional committee:

> It would be preposterous to place such a construction upon the language of this Act as would divest the United States of its title to these lands.

In Confederated Bands of Ute Indians v. United

States, 330 U.S. 169, 177-78 (1947), this Court rejected a claim that an 1880 Act which ratified a treaty with the Ute Indians had confirmed a compensable interest in the Tribe in certain Executive order areas mentioned in the 1880 Act.

> There is not one word in that Act showing a congressional purpose to convey the Executive Order lands, or any other lands, to the Indians. . . .
>
> Nor is it possible to deduce from the 1880 Act a congressional purpose to transform the Executive Order into a conveyance of something more than a mere temporary and cancellable possessory right to the Indians. *Neither the language of the 1880 Act, its legislative history nor the circumstances which brought it about, justify the claim that Congress intended to expand the Executive Order into a transfer of a compensable interest in lands not included in the original treaty reservation.* [Emphasis added.]

In *Sac & Fox Tribe of Indians of Oklahoma v. United States,* 315 F.2d 896, 900 (Ct. Cl. 1963), the Court of Claims stated:

> Appellants apparently assume that "recognition" or "acknowledgment" necessarily follow from an acceptance by the United States of the bare fact that the particular Indians dwelt or hunted, or claimed to dwell or hunt, in the area at that time. *But there must be another indispensable element before recognition is had. The Congress must affirmatively intend to grant the right to occupy and use the land permanently.* [Emphasis added.]

This Court again stated in *Hynes v. Grimes Packing Co.,* 337 US. 86, 104 (1949), another case where

it was claimed that title to an executive order reservation had been confirmed in the Indians:

> When Congress intends to delegate power to turn over lands to the Indians permanently, *one would expect to and doubtless would find definite indications of such purpose.* [Emphasis added.]

The Navajo Petition incorrectly asserts that the court of appeals misapplied and overlooked the case of *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955). A full and complete quotation from the case is in full accord with the decision of the court of appeals as it relates to this issue.

> There is no particular form of congressional recognition of Indian right of permanent occupancy. It may be established in a variety of ways but *there must be the definite intention by congressional action or authority to accord legal rights not merely permissive occupation.* [Emphasis added.]

348 U.S. at 278-79. The critical second sentence of this quotation was omitted in the Navajo petition's quotation of this authority, *see* petition at 11.

As stated in the language of the 1902 Act itself, the lands therein affected were to be reserved for "school or public purposes" with "Indian" use permitted temporarily only until the public purpose could be implemented by the Secretary. That language is precisely suited to exactly the opposite result urged in the Navajo petition. It speaks nothing of granting permanent rights to the unmentioned Navajo Tribe.

These cases also clearly demonstrate that the general rule of liberal construction in Indian legislation, cited in the Navajo petition at 9, does not apply to the confirmation of executive order reservations and consequent divestment of beneficial title from the United States. As this Court stated in *United States v. Union Pacific Railroad Co.*, 353 U.S. 112, 116 (1957):

> Such a construction would run counter to the established rule that land grants are construed favorably to the Government, that nothing passes *except what is conveyed in clear language, and that if there are doubts they are resolved for the government, not against it* [Emphasis added.]

The Navajo theory thus finds no support in the applicable cases. As demonstrated above, it likewise finds no support in the legislative background and history of either the 1902 or 1934 Acts.

F. The Decision of the Court Below on the Navajo Statutory Confirmation Argument will not Affect Other Statutory Indian Reservations.

Contrary to the claim in the Navajo petition, the decision of the court of appeals will have no effect on statutorily created reservations such as those listed in footnote 8 of the petition. The title status of those reservations remains, as it did prior to the court of appeals' decision, subject to determination under the standards set in this Court's *Sioux*, *Confederate Ute*, *Hynes*, and *Tee-Hit-Ton* cases.

When Congress intends to statutorily confirm an executive order Indian reservation, it does so by express language. *See, e.g.*, the Act of July 22, 1958, Pub.L. 85-547, § 1, 72 Stat. 403, which vested the Indian title in the Hopi 1882 Executive Order Reservation and provided the jurisdiction for the *Healing v. Jones* litigation between these same two tribes:

> That lands described in the Executive Order dated December 16, 1882, are hereby declared to be held by the United States in trust for the Hopi Indians and such other Indians, if any, as heretofore have been settled thereon by the Secretary of the Interior pursuant to such Executive order.

The contrast between such clear and express language of grant and recognition and the language of the 1902 Act should put to rest any suspicion that the court below erred in rejecting the Navajo implied confirmation theory for the 1900 Executive Order area and the 1902 Act. It should further dispel any worry that the decision of the court below will somehow unsettle the status of statutorily confirmed or established Indian reservations.

The Navajo argument is not worthy of further consideration by the Court.

CONCLUSION

Review of petitioner MacDonald's first Question presented should be denied; the second Question pre-

sented should only be reviewed as requested in the Hopi petition, *Sekaquaptewa v. MacDonald,* No. 80-258, filed August 20, 1980.

Respectfully submitted,

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